Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 263

MAAS & WALDSTEIN COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 7, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,185)

(35,185)

SUPREME COURT OF THE UNITED STATES

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IN THE

Supreme Court of the United States

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No.

MAAS & WALDSTEIN COMPANY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

MAAS & WALDSTEIN COMPANY,
By HOLMES, PAUL AND HAVENS,
Attorneys for Petitioner,
170 Broadway,
New York, N. Y.

Pandick Press, Inc., 32 Thames St., New York, U. S. A.

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THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Maas & Waldstein Company, a corporation, respectfully shows to this Honorable Court:

This is a petition for writ of certiorari to the Court of Claims of the United States to review a decision made and entered in such Court of Claims on December 9, 1929. Petitioner filed a motion for a new trial on February 6, 1930, which was denied on April 7, 1930.

A.

Summary Statement of the Matter Involved.

This suit was brought by Petitioner to recover from the United States $108,397.63 representing interest on 1916 and 1917 income and excess profits taxes from the date on which

the respective taxes were paid to the dates on which said taxes were refunded to Petitioner.

Petitioner paid excess profits taxes for the year 1917 computed under Section 201 of the Revenue Act of 1917. Prior to and at the time of making payment Petitioner, in accordance with the Treasury Department regulations, requested the Commissioner to assess the excess profits tax by comparison with other corporations pursuant to the provisions of Section 210 of the War Revenue Act of 1917 and stated the reasons why Petitioner was entitled to assessment on that basis of special assessment. Thereafter Petitioner filed a claim for refund on the basis of special assessment.

Subsequently, the Commissioner, acting upon Petitioner's request for special assessment referred to above, recomputed Petitioner's tax under Section 210, and allowed to Petitioner an overassessment of $462,038.34, which amount was in part credited and in part refunded to Petitioner.

Petitioner, relying on Section 1324(a) of the Revenue Act of 1921, claimed interest on said refund and credit of income and excess profits taxes for the year 1917, which the Commissioner of Internal Revenue refused to pay. Section 1324(a) of the Revenue Act of 1921 reads as follows:

> "Sec. 1324(a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, * * *."

The provisions of the section above quoted impose two conditions upon the running of interest:

1. A claim for refund or credit must have been filed, and

2. The tax must have been paid under a specific protest.

The Court of Claims held, however, that by the nature of Section 210 there could be no "protest" nor "claim for refund" within the meaning of Section 1324(a) in any case where a refund allowed by the Commissioner is based upon Section 210. In reaching this conclusion, the Court of Claims held that the action of the Commissioner in allowing or disallowing assessment under Section 210 is final and not subject to review by the Court of Claims; and that where there can be no suit for refund in Court based upon a so-called protest and claim for refund no protest or claim for refund is possible within the meaning of Section 1324(a).

As an additional ground for its decision, the Court of Claims held that it was precluded by the case of *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, from passing upon a claim for interest on a refund or credit of taxes based upon special assessment under Section 210.

The questions presented by this petition are therefore:

(1) Whether Section 1324(a) of the Revenue Act of 1921 prohibits the payment of interest on a refund in all cases where the refund is based upon special assessment under Section 210 of the Revenue Act of 1917, or the like provisions of Sections 327 and 328 of the Revenue Act of 1918;

(2) Whether the principle of the *Williamsport Wire Rope* case precludes the Courts from reviewing the action

of the Commissioner of Internal Revenue in refusing to allow interest on a refund already made by the Commissioner pursuant to special assessment under Section 210 of the Revenue Act of 1917, or the like provisions of Sections 327 and 328 of the Revenue Act of 1918.

Underlying these questions are the even more fundamental questions:

(a) Whether a claim for refund or protest within the meaning of Section 1324(a) must be a claim or protest enforceable in Court?

(b) Whether a claim against the United States to be a claim must be enforceable in Court?

B.

Reasons for Granting the Petition.

1. The Court of Claims erroneously held that Section 1324(a) of the Revenue Act of 1921 prohibits the payment of interest on refunds in *all* cases in which the refund is based upon special assessment. The Court of Claims, in so holding, decided an important question of Federal law which has not been but should be settled by this Court. The decision involves the right of taxpayers to retain interest which has been paid on the many millions of dollars of refunds granted on the basis of special assessment and the right of other taxpayers to collect interest on refunds on which interest has not already been paid.

2. The Court of Claims misconstrued the *Williamsport Wire Rope* case, *supra*, in holding that it precludes the Court of Claims from ever passing upon the Commissioner's disallowance of a claim for interest on a refund

which has already been made by the Commissioner on the basis of special assessment.

The broad holding of the Court of Claims upon which its decision rested as a distinct ground is made clear from the following language of the Court:

> "The Commissioner made a special assessment and allowed it a refund. He did not allow but refused interest, and the plaintiff here is in effect asking the Court to increase the allowance of the Commissioner by allowing interest and passing upon his decision in a matter where his decision was final, and as to which this Court has no jurisdiction. We think we are precluded under this decision in the *Williamsport Wire Rope* case, *supra*, from doing so, as to do so would be to change the amount found by the Commissioner".

This holding affects all suits for interest on refunds based on special assessment, not only those arising under Section 1324(a) of the Revenue Act of 1921 but also under the later statutes providing for interest.

3. In holding that the *Williamsport Wire Rope* case precludes the Court of Claims from reviewing the Commissioner's action in denying interest, on the theory that since the granting of the principal of the refund is within the Commissioner's discretion, the granting of interest on the principal must be likewise within his discretion, the Court has erred in treating the right to interest as merely incidental to the recovery of the principal. This error is in direct conflict with the construction of Section 1324(a) by this Court in the case of *Girard Trust Company* v. *United States*, 270 U. S. 163.

4. The Court of Claims erroneously decided that the purpose and function of a "protest" is to lay the basis

for suit in Court. This Court in *Girard Trust Company* v. *United States, supra*, has held to the contrary in construing Section 1324(a), that "a protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once".

5. The construction given by the Court of Claims to the term "claim for refund" is contrary to the construction which has universally been given to the term as used in the statutes of limitations, and the decision if allowed to stand will cause uncertainty and doubt in a wide class of cases.

Section 252 of the Revenue Act of 1921 provides a limitation on the time within which a refund may be made as follows:

> "Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a *claim therefor is filed* by the taxpayer: * * *" (italics ours).

It has been the universal practice of the Department to make refunds of taxes based upon special assessment just as in other cases more than five years after the date when the return was due in cases in which a "*claim for refund*" was filed within the five year period. If the present decision of the Court of Claims that there can be no claim for refund based on special assessment is correct, the Treasury Department has made and is making many refunds which are unauthorized and improper; it lays open to suit numerous taxpayers who have already received vast amounts of refunds based on special assessment more than five years after payment.

6. The Court of Claims in deciding that "protest" implies the right to sue has disregarded the legislative interpretation of the word running over nearly a century. Every tariff act passed by Congress since 1842 has made protest a condition precedent to the recovery of duties wrongfully collected. At the same time, every one of the tariff acts limited the right of recovery of duties in the case of erroneous appraisal to a proceeding before the statutory appraisers, with no right of appeal to the Courts. Congress has always required a protest in these cases, although forbidding suit in Court. See *Bartlett* v. *Kane*, 16 How. 263, 272; *Hilton* v. *Merritt*, 110 U. S. 97, 105; *Passavant* v. *United States*, 148 U. S. 214.

7. The Court of Claims has erroneously decided that there can be no "claim for refund" of taxes unless such claim is enforceable in Court. This is contrary to numerous decisions of this Court recognizing and upholding many kinds of claims against the Government which are enforceable only before an administrative officer or bureau. See *United States* v. *Babcock*, 250 U. S. 328; *United States* v. *Atchison T. & S. F. Ry. Co.*, 249 U. S. 451.

8. The Court of Claims in the case at bar has flagrantly disregarded the principle so often repeated by this Court, that all provisions of the Revenue Acts are to be liberally construed in favor of taxpayers, in giving an arbitrarily restricted meaning to "protest" and "claims for refund" in a remedial section of a Revenue Act.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims, commanding that court to certify and to send to this Court

for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. H-156, Maas and Waldstein Company, Petitioner v. United States, Respondent, and that said judgment of the Court of Claims may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

MAAS & WALDSTEIN COMPANY,

By HOLMES, PAUL AND HAVENS,
Attorneys for Petitioner,
170 Broadway,
New York, N. Y.

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

H-156

MAAS & WALDSTEIN COMPANY

against

THE UNITED STATES OF AMERICA

I. PETITION—Filed April 13, 1927

To the Honorable Judges of the Court of Claims of the United States:

The petitioner by George E. Holmes, its attorney, respectfully shows to this court and alleges:

1. That this petition is filed to recover the sum of $108,897.53, representing interest on the amount of $462,038.34, income and excess profits taxes overpaid for the year 1917 and $2,476.23 income tax overpaid for the year 1916.

2. That at all times hereinafter mentioned the petitioner was and still is a domestic corporation organized and existing under the laws of the State of New Jersey, with its principal office at 45 John Street, New York, N. Y.

3. That the petitioner has not in any way voluntarily aided, abetted or given encouragement to rebellion against the government of the United States.

[fol. 2] 4. That no part of the said amount of $108,897.53 representing interest due petitioner on the above mentioned overpayments of income and excess profits taxes for the years 1916 and 1917 has been assigned or transferred by the petitioner, and that the said petitioner is entitled to the entire amount thereof after allowing all just credits and offsets due to the United States.

5. That petitioner's claim for interest on the above mentioned overpayment of income and excess profits taxes is founded upon the following statutes:

Statutes Involved

Revenue Act of 1921

"Sec. 1324 (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

Revenue Act of 1924

"Sec. 1019. Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum [fol. 3] per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

Revenue Act of 1926

"Sec. 1116 (a). Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without

authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date of such tax, penalty or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount."

6. That petitioner's claim to interest on the above mentioned overpayments of income and excess profits taxes is also founded in part upon Article 1040 of Regulations 62 promulgated by the United States Treasury Department under the Revenue Act of 1921; Article 1371 of Regulations 65 promulgated by the Treasury Department under the Revenue Act of 1924 and Article 1371 of Regulations 69 promulgated by the Treasury Department under the Revenue Act of 1926.

Statement of Facts

7. That under date of February 5, 1918, the petitioner addressed a letter to Daniel C. Roper, Commissioner of [fol. 4] Internal Revenue, requesting that its excess profits tax for the year 1917 be assessed under the provisions of Section 210 of the Revenue Act of 1917. A copy of this letter is attached hereto marked "Taxpayer's Exhibit No. 1."

8. That the petitioner subsequently received from the Bureau of Internal Revenue a letter dated February 15, 1918, referring to petitioner's letter of February 5, 1918, and requesting that the facts covering petitioner's case be submitted to the Bureau of Internal Revenue in writing. A copy of this letter is attached hereto marked "Taxpayer's Exhibit No. 2."

9. That subsequently, on March 28, 1918, the petitioner filed with the Collector of Internal Revenue for the Second District of New York, its corporation income tax return, corporation excess profits tax return and munition manufacturers tax return for the year 1917.

10. That the petitioner attached to its income and excess profits tax returns a letter dated March 28, 1918, addressed to the Commissioner of Internal Revenue, Washington, D. C., protesting against the excess profits taxes disclosed by the said returns and requesting assessment under the provisions of Section 210 of the Revenue Act of 1917 and Articles 52, 18 and 24 of Regulations 41. A copy of this letter is attached hereto marked "Taxpayer's Exhibit No. 3."

11. That subsequently on June 14, 1918, the petitioner in accordance with notices and demands for payment of corporation income and excess profits taxes based upon the above mentioned returns, paid to the Collector of Internal Revenue for the Second District of New York income and [fol. 5] excess profits taxes in the amount of $1,508,400.25.

12. That at the time of paying the said income and excess profits taxes for the year 1917, petitioner forwarded to William H. Edwards, Collector of Internal Revenue for the Second District of New York, a letter dated June 14, 1918, again protesting against the payment of the said taxes and calling attention to its previous letter of March 28, 1918, wherein it requested assessment under the provisions of Section 210 of the Revenue Act of 1917. A copy of this letter is attached hereto marked "Taxpayer's Exhibit No. 4."

13. That under date of April 20, 1917, the petitioner paid to the Collector of Internal Revenue for the Second District of New York $20,542.01 representing income tax for the year 1916, and under date of November 14, 1917, paid to the said Collector an additional amount of $1,741.50 representing income tax for the year 1916, thereby resulting in a total payment of $22,273.51 for the year 1916.

14. That the income tax paid to the Collector of Internal Revenue for the year 1916 and the income and excess profits taxes paid to the Collector of Internal Revenue for the year 1917 were by the Collector of Internal Revenue turned over to the United States Treasury Department in the usual course of business and retained by the United States Treasury Department until subsequently refunded to the petitioner on May 12, 1922.

15. That subsequent to the payment of the income and excess profits taxes for the years 1916 and 1917, petitioner continued its protest against the payment of the same and [fol. 6] the Commissioner of Internal Revenue continued his consideration of petitioner's request for assessment of its excess profits tax under Section 210 of the Revenue Act of 1917.

16. That under date of December 30, 1921, petitioner filed with the Collector of Internal Revenue for the Second District of New York a formal claim for refund of $2,476.22 income tax for the year 1916 and $462,287.07 income and excess profits taxes for the year 1917. A copy of the said claim is attached hereto marked "Taxpayer's Exhibit No. 5."

17. That on or about May 6, 1922, the Commissioner of Internal Revenue forwarded to the petitioner a certificate of overassessment for the year 1917 disclosing that petitioner had overpaid its income and excess profits taxes for that year by the amount of $462,038.34 and also forwarded to the petitioner under the same date another certificate of overassessment certifying that petitioner had overpaid its income tax liability for the year 1916 by the amount of $2,476.23. Copies of the overassessments for the years 1916 and 1917 are attached hereto marked "Taxpayer's Exhibits Nos. 6 and 7," respectively.

18. That prior to May 6, 1922, the Commissioner of Internal Revenue had assessed against the petitioner additional munitions taxes for the year 1917 in the amount of $8,642.16.

19. That the said assessment for additional munitions taxes in the amount of $8,642.16 remained on the Collector's books on May 6, 1922, and was by the Collector of Internal Revenue offset against the overpayment of $462,- [fol. 7] 038.34 for the year 1917, thereby resulting in a net refund to the petitioner of $453,396.18 for the year 1917.

20. That the allowance to petitioner of the refunds for the years 1916 and 1917 was finally approved by the Commissioner on or about May 10, 1922, and that under date of May 12, 1922, check was issued to petitioner for the

amount of $455,872.41 representing refund for 1917 of $453,396.18 and refund for 1916 of $2,476.23.

21. That subsequently, on or about July 25, 1922, the Commissioner of Internal Revenue determined that the additional assessment of munitions taxes for the year 1917 in the amount of $8,642.16, which assessment had been offset against income and excess profits taxes overpaid for the year 1917, was erroneous and the said amount of $8,642.16, together with an additional amount of munitions taxes was refunded to the petitioner, thereby resulting in a net refund to the petitioner of $462,038.34 income and excess profits taxes for the year 1917.

22. That thereafter on or about October 3, 1922, petitioner demanded interest on the overpayment of its income and excess profits taxes for the years 1916 and 1917.

23. That under date of August 4, 1923, the Bureau of Internal Revenue forwarded to the petitioner a letter refusing to allow interest on the above mentioned overpayments. A copy of this letter is attached hereto marked "Taxpayer's Exhibit No. 8."

24. That subsequently the petitioner again demanded interest on the said overpayments of 1916 and 1917 income and excess profits taxes and under date of February 14, [fol. 8] 1927, the Commissioner addressed another letter to petitioner's attorneys refusing to allow interest on the said overpayments. A copy of the Commission's letter of February 14, 1927, is attached hereto marked "Taxpayer's Exhibit No. 9."

Wherefore, petitioner prays judgment against the United States of America for the sum of $108,897.53, or such other amount as the court may find due, representing interest on 1916 and 1917 income and excess profits taxes from the date on which the respective taxes were paid to the dates on which said taxes were refunded to the petitioner.

Maas & Waldstein Company, by Geo. E. Holmes, Attorney for the Petitioner, 15 William Street, New York, N. Y. Holmes, Paul & Havens, Attorneys for the Petitioner, 15 William Street, New York, N. Y.

[fol. 9] *Duly sworn to by F. Magnus. Jurat omitted in printing.*

[fol. 10] TAXPAYER'S EXHIBIT No. 1 TO PETITION

Maas & Waldstein Co.

February 5, 1918.

Daniel C. Roper, Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: We have read "Regulations No. 41 Relative to the War Excess Profits Tax" and are of the opinion that the facts as to our company constitute one of the exceptional cases as described in Article 52 of the Regulations.

We should like very much to have the opportunity of laying before you the operation of the law in our case, and to obtain your opinion as to whether or not the Department would consider our statement as justifying an assessment under Section 210.

If you will kindly appoint a time at which we may briefly discuss the matter with you, we shall be pleased to call at your office in Washington.

Very truly your, Maas & Waldstein Company, Henry V. Walker, President.

[fol. 11] TAXPAYER'S EXHIBIT No. 2 TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT-EP
TRB

February 15, 1918.

Maas & Waldstein Co., Newark, N. J.

SIRS: This office is in receipt of your letter of the 5th ult. in which you state that you have read Regulations No. 41 and believe that the facts as to your Company are such as to constitute it an exceptional case, and add that you should like very much to have the opportunity of laying before this office the facts in the case with a view to ascer-

taining whether or not the provisions of Section 210 of the Act would govern.

In reply you are advised that this office would prefer to have you file a statement of facts in writing covering fully the case of your Company, which statement will receive prompt consideration. In the event the conditions are such that this office will then be unable to make a decision in the matter, an appointment as suggested by you may be arranged.

Respectfully, (Signed) L. F. Speer, Deputy Comsioner.

[fol. 12] TAXPAYER'S EXHIBIT No. 3 TO PETITION

Maas & Waldstein Co.

March 28, 1918.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: We beg to submit herewith tax returns for the Maas & Waldstein Company covering the year 1917 as follows:

Tax return	Amount of tax
Corporation Income Tax Return	$72,762.90
" " " "	482.56
Munitions Manufacturers' Tax Return	242,704.39
Corporation Excess Profits Tax Return	1,435,637.35
Total Amount of Tax	$1,751,587.20

Our net income for the taxable year was $2,656,395.01. We are therefore required to pay in the above taxes substantially 66% of our next income. Of the total amount of the Excess Profits Tax, substantially 83% is assessed at the 60% rate, in addition to which we are required to pay over $242,000 for the Munitions Manufacturers' Tax.

It is our opinion that our tax is proportionately larger than that of other representative concerns in the same line of business. It is our further opinion that this disproportion arises from causes of the nature of those specified in Article 52, of Regulations No. 41, for the following reasons:

1. Under paragraph 3, Article 52, it is our belief that through the simple form and manner of our organization we are placed at a disadvantage in comparison with representative concerns in a similar trade or business. In ac-
[fol. 13] cordance with the regulations applying to Excess Profits Tax Returns, we have reduced the value of the tangible assets acquired at the time of our organization to $100,000. No proper evidence of the actual value of these assets when acquired by the corporation is now in existence, but it is our opinion that their actual value was far in excess of $100,000. By reason of our organization, it has been possible to make our return in strict accord with the law and the regulations. We believe that this fact places us at a disadvantage with concerns which, by reason of the manner of their organization, and by reason of reorganizations through which they may have passed, are not able to correct their capital account in the manner provided in the regulations.

2. Under paragraph 4, Article 52, our invested capital, when computed in the manner specified in the regulations, is manifestly seriously disproportionate to the taxable income. This arises in part for the reasons specified in the preceding paragraph, and in part for the reason specified under (b) in paragraph 4. About 90% of our total net income was earned through the operation of our gun cotton plant. This plant was erected solely for war purposes to meet the needs of a foreign government and will not be wanted for the purpose of our trade or business after the termination of the war. Under the regulations it has not been possible to properly allow for the amortization and exceptional depreciation of this plant.

Upon the above statement, which we are prepared to support and amplify if required, we request assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41.

Very truly yours, Maas & Waldstein Co., Henry V. Walker, President.

[fol. 14] TAXPAYER'S EXHIBIT NO. 4 TO PETITION

Maas & Waldstein Co.

New York, June 14, 1918.

Wm. H. Edwards, Collector of Internal Revenue, 2nd District of New York, Custom House Building, New York City.

DEAR SIR: Enclosed you will please find check which is tendered in accordance with notices of assessment received.

Together with our returns for corporation income tax, excess profits tax, and munitions tax, we filed a request dated May 28th, for assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations 41.

Understanding that these questions will be passed upon at a later date, we shall be pleased to be advised that a hearing will be granted to us.

Very truly your, Maas & Waldstein Company, Signed F. Magnus, Treas.

[fol. 15] TAXPAYER'S EXHIBIT NO. 5 TO PETITION

Treasury Department Internal Revenue Service Form 46

CLAIM FOR REFUND

Taxes Erroneously or Illegally Collected; Also Amounts Paid for Stamps Used in Error or Excess

STATE OF N. Y.
County of N. Y., ss:

Maas & Waldstein Company of New Jersey,
#92 William Street, New York, N. Y.

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged by claimant — Manufacture of chemicals.

2. Character of assessment or tax—Excess Profits tax for 1917; Income Tax for 1916 and 1917.

3. Amount of assessment or stamps for 1916, $22,273.51; for 1917, $1,508,400.25 ..... $1,530,673.76

4. Amount now asked to be refunded (or such greater amount as is legally refundable .. 464,764.29

5. Date of payment of assessment or purchase of stamps—See below.

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons:

Net income for 1916 as reported	$1,113,675.15		
Corrected net income as shown by brief filed by Company at Washington	989,864.11		
Reduction of income and tax, income	123,811.04	Tax at 2%	$2,476.22
Income & Excess profits tax paid for 1917 ..	$1,508,400.25		
Tax determined on basis of decision by Committee on Appeals & Review Dec. 19, 1921	$1,046,113.18		
Difference to be refunded			462,287.07
Total refund due			$464,763.29

With interest at 12½% per month to date of payment, according to Section 1324, Revenue Act of 1921.

Attached hereto is a copy of notice of decision of the Committee on Appeals & Review, marked Exhibit "A."

Also photographic copy of receipt for payment of tax for 1916, amounting to $22,273.51, of which $20,542.01 paid on Aril 20, 1917, and $1,731.50 paid on November 14, 1917, also photographic copy of taxpayer's record of payment of tax for 1917, amounting to $1,508,400.25 paid on June 14th, 1918; also copies of protests filed with return March 28, 1918, and upon payment of tax June 14, 1918.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in Item 3.

Signed: Maas & Waldstein Co., C. Magnus, Treas.

Sworn to and subscribed before me this 23rd day of December, 1921, Frederick A. Thayer, Notary Public 714, N. Y. County. [Seal]

[fol. 16] TAXPAYER'S EXHIBIT No. 6 TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue,

Income Tax Unit

May 12, 1922

Overassessment Certificate of

Number: 326016. Allowed: $2,476.23. Rejected: $——

IT:SA:SM

LP

Maas and Waldstein Company, 92 William Street, New York, N. Y.

Sirs: An audit of your income tax return for 1916, Form 1031, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

You are advised that after a careful examination of your 1916 income tax return, it is found that there has been an overassessment of $2,476.23, specific details of which are as follows:

Net income, amended return		$1,113,675.10
Less Munition taxes (omitted in deduction)		123,811.04
Corrected net income		$989,864.11
Total tax assessable		$19,797.28
Tax assessed on New Jersey return, original	$20,542.01	
Tax assessed on amended New Jersey return	1,731.50	22,273.51
Indicating an overassessment of		$2,476.23

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the Collector of Internal Revenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Respectfully, E. H. Batson, Deputy Commissioner,
by S. Alexander, Head of Division.

Schedule Number: 948; District: ——; Amount abated: $——; Amount credited: $——; Year: ——; Account Number: ——; Amount refunded: $2476.23.

Instructions executed May 6, 1922.

[Stamp here] Signature—Frank K. Bowers,
Collector Int. Rev.

[fol. 17] TAXPAYER'S EXHIBIT NO. 7 TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue,

Income Tax Unit

Certificate of Overassessment

Number: 326017. Allowed $462,038.34. Rejected: $——
IT:SA:SM
LP-200

Maas and Waldstein Company, 92 William Street, New York, N. Y.

SIRS: An audit of your income tax return for 1917, Form 1031, an examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

You are advised that after careful consideration of all the facts, as set forth in statements filed with your returns, together with other data submitted and in connection with the recommendation of the Committee on Appeals and Review, your excess profits tax has been computed under the

provisions of Section 210 of the Revenue Act of 1917, and Articles 18, 24 and 52 of Regulations 41, which provide that an excess profits tax may be based upon a comparison with a group of concerns engaged in a like or similar line of business, which in their general character are comparable, as to the essential component parts influencing the tax liability, to your company.

The result thus determined after giving effect to necessary changes in the net income, developed through audit of the returns, indicates an overassessment of $462,038.34, specific details of which are as follows (see page 2 for computation):

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the Collector of Internal Revenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Respectfully, E. H. Batson, Deputy Commissioner,
by S. Alexander, Head of Division.

Schedule Number: 948; District: 2d N. Y.; Amount abated: $8642.16; Amount credited: $——; Year: ——; Account Number: ——; Amount refunded: $453,396.18.

Instructions executed May 6, 1922. Stamp Here: ——; Signature: ——. Frank K. Bowers, Collector Int. Rev.

[fol. 18] Certificate of Overassessment

Maas and Waldstein Company

1917

Net income as returned	$2,648,352.36
Depreciation disallowed	108,575.01
Income from New York Business	8,042.65
1916 munitions taxes	123,811.04
Total	2,888,781.06

Less munitions taxes (omitted in deduction)		242,704.39
Corrected net income		$2,646,076.67

Computation of Tax

Excess profits tax		$944,252.46
Net income	$2,646,076.67	
Less excess profits tax	944,252.46	
Amount taxable at 2%	$1,701,824.21	34,036.48
Amount taxable at 4%	$1,701,824.21	68,072.97
Total tax assessable		$1,046,361.91
Tax previously assessed		1,508,400.25
Indicating an overassessment of		$462,038.34

[fol. 19] TAXPAYER'S EXHIBIT No. 8 TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to IT:Ad:R.CC:ECW.

August 4th, 1923.

Maas & Waldstein Company, 92 William Street, New York, New York

SIRS: Reference is made to Certificates of Overassessment number 326017 in the amount of $462,038.34 relating to corporation income tax for the year 1917.

In connection with request contained in your letter of October 3, 1922, for the payment of interest as a result of the issuance of the Certificate of Overassessment referred to, attention is invited to Section 1324 (a) of the Revenue Act of 1921, which provides in part as follows: "That upon the allowance of a claim for the refund of or credit for Internal Revenue taxes paid, interest shall be allowed and paid."

It will be noted that interest is payable only upon the allowance of a claim for credit or refund. The provisions of said section for the allowance of interest from the date of payment of the tax which was paid under a specific protest or pursuant to an additional assessment is likewise limited to amounts paid under either of such conditions which are refunded or credited through the allowance of a prescribed claim.

[fol. 20] Bureau records show that your claim, dated December 23, 1921, for the refund of $462,287.07 of the amount of income tax paid for 1917 was filed with the Collector of Internal Revenue on December 30, 1921, and that the same was allowed within six months from the date of filing. No additional assessment was made in connection with such income tax for the year involved, but you assert that the tax was paid under protest. However, as indicated in letter dated September 30, 1922, from your attorney to you, a copy of which has been furnished to this office, it has heretofore been held that an application for special assessment is not of itself sufficient to constitute a specific protest to meet the requirements of Section 1324 (a) of the Revenue Act of 1921. Your letter dated March 28, 1918, constitutes merely an application for relief under the provisions of Section 210 of the Revenue Act of 1917, and your letter dated June 14, 1918, appears to be merely a letter of transmittal of a check in payment of the tax, and incidentally refers to the prior request for special assessment. In neither letter did you state that the tax was paid under protest, but only invited attention to the fact that in the opinion of your company the tax paid was proportionately larger than that of representative concerns in a like business. The fact that you set out in some detail the reasons which give rise to the abnormality does not alter the character of the letters.

In view of the foregoing it is held that interest is not payable upon the amount refunded for the year 1917.

Respectfully, J. G. Bright, Deputy Commissioner, by F. M. Woodward, Head of Division (signed).

[fol. 21] TAXPAYER'S EXHIBIT No. 9 TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refers to IT:C:CC:4-MTH

Feb. 14, 1927.

Holmes, Paul & Havens, 15 William Street, New York, New York.

In re: Maas & Waldstein Co., New York, New York.

SIRS: Reference is made to your request for interest on an amount refunded to the above named taxpayer as a result of an overpayment of income tax for the year 1917.

By office letter dated August 4, 1923, the taxpayer was fully advised by the Bureau's position in the matter, since which time the case has been considered closed. It does not appear that any new or material evidence has been furnished since that time to substantiate the taxpayer's claim for interest. For your convenience, however, the facts in the case are again outlined.

Office record show that the taxpayer filed its 1917 returns on March 18, 1918, accompanied by a detailed request for special assessment under the provisions of Section 210 of the Revenue Act of 1917. The payment of the tax was made on June 14, 1918, and at the same time the following letter was addressed to the Collector at New York:

[fol. 22] "Enclosed you will please find check which is tendered in accordance with notices of assessment received.

Together with our returns for corporation income tax, excess profits tax, and munitions tax, we filed a request dated May 28th, for assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations 41.

Understanding that these questions will be passed upon at a later date, we shall be pleased to be advised that a hearing will be granted to us."

You contend that the request for special assessment, and the letter quoted above constituted both a specific protest and an informal claim for refund, within the meaning of Section 1324-a of the Revenue Act of 1921, and that accordingly interest should have been allowed upon the amount refunded to the taxpayer from the time when the taxes were paid, or at least from six months after the letters were filed.

A careful consideration of the letters in question indicates, however, that they constituted merely an application for relief under the provisions of Section 210 of the Revenue Act of 1917. In neither of the letters did the taxpayer state that the tax was paid under protest. All that it did was to invite attention to the fact that in its opinion the tax paid was proportionately larger than that of representative concerns in a like business. The fact that the taxpayer set out in some detail the reasons, which, in its opinion, gave rise to the abnormality does not alter the character of the letters.

The question presented has previously been considered and it was held (IT:1335-CB-I-I, 404) that an application for special assessment does not of itself constitute a sufficient protest to meet the requirements of Section 1324-a of the Revenue Act of 1921. Accordingly it has been con- [fol. 23] cluded that the letters involved in the instant case may not be construed as a specific protest within the meaning of the statute.

In King's County Savings Institution *v.* Blair (116 U. S. 200), the Supreme Court held that "No claim for refunding of taxes can be made according to law and the regulations until after the taxes have been paid." The first letter of the taxpayer, therefore, may not be construed as an informal claim for refund, inasmuch as it was filed prior to the payment of the tax. The second letter appears to be merely a letter of transmittal and incidentally refers to the prior request for special assessment.

Inasmuch as there was no additional tax, and the original tax was not paid under protest, and the only claim for refund on record, filed December 30, 1921, was adjusted April 15, 1922, within six months from the date of filing, no interest is allowable under the Revenue Act which

governs this adjustment, and the information furnished in office letter dated August 4, 1923, is hereby confirmed.

Respectfully, C. R. Nash, Assistant to the Commissioner, by Wm. Sherwood, Head of Division.

[fol. 24] GENERAL TRAVERSE—Filed May 23, 1927

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

A. H. McC.

III. ARGUMENT AND SUBMISSION

On April 2, 1929, this case was argued and submitted on merits by Mr. Harold S. Deming, for plaintiff, and by Mr. Charles R. Pollard, for defendant.

[fol.25] IV. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Graham, J.**— Filed December 9, 1929

This case having been heard by the Court of Claims upon an agreed statement of facts signed on behalf of plaintiff by its attorneys Holmes, Paul & Havens, and on behalf of defendant by Assistant Attorney General Herman J. Galloway, and the evidence, the court makes the following

SPECIAL FINDINGS OF FACT

I

The plaintiff, Maas & Waldstein Company, is a domestic corporation organized and existing under the laws of the State of New Jersey with its principal office at 45 John Street, New York, New York.

II

Plaintiff, under date of February 5, 1918, addressed a letter to Daniel C. Roper, Commissioner of Internal Revenue, requesting that its excess profits tax for the year 1917 be assessed under the provisions of section 210 of the revenue act of 1917. A true copy of this letter, marked "Exhibit No. 1," is attached to the petition and by reference is made a part hereof.

III

The plaintiff subsequently received from the Bureau of Internal Revenue a letter dated February 15, 1918, referring to its letter of February 5, 1918, requesting that the facts covering plaintiff's case be submitted to the Bureau of Internal Revenue in writing. A true copy of this letter, marked "Exhibit No. 2," is attached to the petition and by reference is made a part hereof.

IV

Plaintiff filed its income tax return for the year 1916, from which it appeared that the income tax due thereon was $20,542.01. Said tax was paid at the time and in the manner prescribed by law.

[fol. 26]

V

Plaintiff filed its corporation income and excess-profits tax return for the year 1917 on March 28, 1918, from which it appeared that the income and excess-profits tax due thereon was $1,508,400.25. The said tax was paid on June 20, 1918.

VI

Plaintiff filed its munitions manufacturers' tax return for the year 1917 on March 28, 1918, from which it appeared that the tax due thereon was $242,704.39. The said tax was also paid on June 20, 1918.

VII

Plaintiff attached to its income and excess-profits tax returns for the year 1917 a letter dated March 28, 1918, addressed to the Commissioner of Internal Revenue, Washington, D. C., in which it set forth its reasons why the tax should be computed under the provisions of articles 52, 18, and 24, regulations 41, revenue act of 1917. A true copy of said letter, marked "Exhibit No. 3," is attached to the petition and by refence made a part hereof.

VIII

At the time the said corporation income and excess-profits and munitions manufacturers' taxes were paid, June 20, 1918, the plaintiff forwarded to William H. Edwards, collector of internal revenue for the second district of New York, a letter dated June 14, 1918, reiterating the statement as to what provisions of regulations 41 applied. A true copy of said letter, marked "Exhibit No. 4," is attached to the petition and by reference made a part hereof.

IX

On the 7th day of November, 1917, the Commissioner of Internal Revenue made an assessment of the underpayment of tax against the plaintiff for the year 1916 in the sum of $1,731.50 and scheduled the same to the collector of internal revenue referred to above.

X

On the 14th day of November, 1917, plaintiff paid to the said collector the sum of $1,731.50, which represented an underpayment of tax for the year 1916.

XI

Plaintiff under date of December 30, 1921, filed with the collector of internal revenue for the second district of New York a claim for refund of $2,476.22 income tax for the year 1916 and of $462,287.07 income and excess-profits tax for the year 1917. A true copy of said claim for refund,

marked "Exhibit No. 5," is attached to the petition and by reference made a part hereof.

[fol. 27]

XII

The Commissioner of Internal Revenue after an examination of the munitions manufacturers' tax return for the year 1917 determined an underpayment of the tax for said year in the amount of $8,642.16.

XIII

On February 15, 1922, the collector of internal revenue for said district mailed to plaintiff notice and demand for the payment of said underpayment of tax. On February 24, 1922, plaintiff filed a claim for the abatement of the underpayment of tax in the sum of $8,642.16.

XIV

On the 15th day of April, 1922, the Commissioner of Internal Revenue approved a schedule of overassessments known and designated as Schedule IT:A:948, on Form 7777. Said schedule of overassessments embraced, among other overpayments, overpayments in favor of plaintiff in the sum of $2,476.23 for the year 1916 and $462,038.34 for the year 1917. Said schedule of overassessments was transmitted to the collector of internal revenue for the second district of New York for his action in accordance with the direction appearing thereon.

XV

The said collector of internal revenue complied with the directions appearing thereon and on May 6, 1922, returned said schedule to the Commissioner of Internal Revenue, together with Schedule IT:R:948 on Form 7777A.

XVI

On or about May 6, 1922, the collector of internal revenue mailed to plaintiff a copy of certificate of overassessment in the sum of $2,476.23, for the year 1916. A true copy of said certificate of overassessment is attached to plaintiff's

petition, marked "Exhibit 6," and by reference made a part hereof.

XVII

On or about May 6, 1922, the collector of internal revenue mailed to plaintiff a copy of certificate of overassessment in the sum of $462,038.34 for the year 1917. A true copy of said certificate of overassessment is attached to plaintiff's petition, marked "Exhibit 7," and by reference made a part hereof.

XVIII

The collector of internal revenue on schedule of overassessments IT:R:948 credited part of the overpayment of the taxes in the sum of $462,038.34 for the year 1917 against the underpayment of the munitions manufacturers' tax of $8,642.16, leaving an amount to be refunded in the sum of $453,396.18, and returned said schedule of overas- [fol. 28] sessments to the said commissioner, as set forth in Finding XV herein.

XIX

On the 27th day of June, 1922, the Commissioner of Internal Revenue approved a schedule of overassessments known and designated as Schedule IT:A:1528 on Form 7777. Said schedule of overassessments embraced, among other overpayments, an overpayment in favor of the plaintiff in the sum of $20,520.00. Said schedule of overassessments was transmitted to the said collector for his action in accordance with the direction appearing thereon.

XX

The collector of internal revenue complied with the directions appearing on said schedule of overassessments and on July 25, 1922, returned said schedule of overassessments to the commissioner, together with Schedule IT:R:1528, on Form 7777A.

XXI

On or about August 1, 1922, the collector of internal revenue mailed to plaintiff a copy of certificate of overas-

sessment in the sum of $20,520.00, munitions manufacturers' tax for the year 1917.

XXII

Under date of June 14, 1922, the Commissioner of Internal Revenue mailed a letter in which plaintiff was informed that a reexamination of its income and excess-profits tax returns for the year 1917 disclosed that the tax for said year had been underpaid by $4,696.97.

In August, 1922, the Commissioner of Internal Revenue made an additional assessment of the underpayment of tax against plaintiff for said year in the sum of $4,696.97.

XXIII

The schedule of refunds for the refunding of $2,476.23 and $453,396.18 was signed by the Commissioner of Internal Revenue on May 9, 1922, and schedule of refunds for the refunding of $20,520.00 was signed on August 3, 1922, and Treasury warrants for the said amounts were thereafter issued to plaintiff.

XXIV

Plaintiff has been allowed no interest on overpayments shown on said schedules for the years 1916 and 1917.

XXV

Plaintiff has paid no interest on the underpayment of $4,696.97 for the year 1917, or any part thereof.

[fol. 29]

XXVI

Under date of August 4, 1923, the Commissioner of Internal Revenue by letter to plaintiff refused to allow interest upon the overpayment of income and excess-profits taxes for the year 1917.

XXVII

Subsequent to August 4, 1923, the plaintiff filed with the Commissioner of Internal Revenue another request for in-

terest on the overpayment of corporation income and excess-profits taxes for the year 1917, and under date of February 14, 1927, the commissioner by letter to plaintiff's atorneys again refused to allow interest on the said overpayment.

Conclusion of Law

Upon the foregoing special findings of fact which are made part of the judgment herein the court decides as a conclusion of law that the plaintiff is entitled to recover interest on $1,731.50 at the rate of 6% per annum from November 14, 1917, the date on which the additional assessment was paid to May 9, 1922, the date on which the schedule allowing refund was approved by the Commissioner of Internal Revenue.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States interest on $1,731.50 at the rate of 6% per annum from November 14, 1917, to May 9, 1922.

Opinion

Graham, Judge, delivered the opinion of the court:

This case involves a claim for interest on a claimed allowance of a refund. It grows out of the application to the facts, which will be briefly stated, of the following provisions of the revenue act of 1921, 42 Stat. 316:

"Sec. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal-revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: * * *

"(2) If such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid; * * *"

The plaintiff states its contentions as follows:

1. That it should be allowed interest on the overpayment of 1916 income tax in the amount of $1,731.50, from November 14, 1917, the date on which the additional assessment was paid, to May 9, 1922, the date on which the schedule was signed by the Commissioner of Internal Revenue allowing the refund.

2. That it should be allowed interest on the amount of $457,341.37, representing the net overpayment of income and excess-profits taxes for the year 1917 ($462,038.34 less $4,696.97) from the date on which said taxes were paid, June 20, 1918, to the date on which the schedule allowing the said refund was signed by the commissioner, May 9, 1922.

[fol. 30] 3. That if this court should decide that its income and excess profits taxes for the year 1917 were not paid under a specific protest within the meaning of section 1324 (a) (1) of the revenue act of 1921, it should be allowed interest on the above-mentioned overpayment of $457,341.37 from six months after June 20, 1918, to May 9, 1922.

The defendant's contention in reply admits the first contention of plaintiff, and confines itself in its defense to the second upon the grounds:

(1) That the plaintiff, as required by the act, filed no specific protest when paying the tax; and

(2) That it filed no claim of refund in connection with the payment of said tax:

It would profit nothing in reaching a conclusion in the case to go into the details of the figures and facts involved. The questions first to be considered are those raised by the defendant as to whether the plaintiff "paid under a specific protest" and whether the allowance of overpayment was based upon a claim for a refund; that is to say, whether a claim for a refund was ever filed. The facts stated generally and in effect are as follows:

In February, 1918, before paying its taxes for the year 1917, plaintiff communicated with the Bureau of Internal Revenue, stating that it would like to have an opportunity to lay before the commissioner the operation of law in its case, and to obtain his opinion as to whether or not the

bureau would consider its statement as justifying an assessment under section 210 of the act.

Section 210 of the revenue act of 1917, gave to the Secretary of the Treasury and the Commissioner of Internal Revenue power to grant relief to taxpayers where invested capital could not be satisfactorily ascertained and it appeared that a taxpayer was paying a larger tax than other companies engaged in a like or similar trade or business. It is to be noted in passing that this section was passed upon by the Supreme Court in the Williamsport Wire Rope Co. case, 277 U. S. 551, 561, which held that this court had no jurisdiction to review the conclusions of the Commissioner of Internal Revenue in ascertaining invested capital under this section and granting relief thereunder. Section 210 is not a taxing statute, and a protest against the commissioner's conclusion or decision under it would be futile, and even if it were made, would not entitle the plaintiff to relief in this court on account of either failure to make a special assessment or from an assessment which had been made and was unsatisfactory to the taxpayer, or a refusal to make a special assessment or make any change with regard to the plaintiff's invested capital, leaving it as under the return.

Thus it appears that the plaintiff was asking for a hearing under this section, and to its request the commissioner replied on February 15, 1918, suggesting that it file a statement of the facts in writing covering its case, which statement would receive consideration. On March 28, 1918, plaintiff filed its tax return for the year 1917 and accompanied it with a statement of the character suggested by the commissioner relative to a special assessment under section 210. In this statement it claimed that its tax under the requirements of the return was "proportionately larger [fol. 31] than that of other representative concerns in the same line of business;" further, that the simple form and manner of its organization placed it "at a disadvantage in comparison with representative concerns in a similar trade or business," and that under paragraph 4, article 52 of the regulations, its "invested capital, when computed in the manner specified in the regulations, is manifestly seriously disproportionate to the taxable income" and concluded: "We request assessment in the manner provided for in ar-

ticle 52, referring also to articles 18 and 24, Regulation No. 41."

It thereafter paid the tax according to its return, on June 20, 1918, and in doing so stated that, together with its returns for corporation income tax, excess-profits tax, and munitions tax "we filed a request on May 28 for assessment in the manner provided for in article 52, referring also to articles 18 and 24, Regulations 41."

On May 6, 1922, the commissioner mailed to the plaintiff a copy of certificate of overassessment in connection with said taxes of $462,038.34 and thereafter paid a refund to the plaintiff on this basis, the details of which it is not necessary to note at this point.

The plaintiff is contending that it asked for a special assessment and indicated its opinion that the amount assessed against it under its return was out of proportion to that assessed against corporations in a similar line of business, and that this request for a special assessment was a protest within the meaning of said section 1324 (a) of the revenue act of 1921 and also constituted a claim for a refund.

The question is Did it amount to a protest within the meaning of section 1324 (a), and was it a claim for a refund within the meaning of that section. Taking up, first, the question of "protest" it is a term indicating disagreement or objection by the party making it and conveying to the other party this state of mind, and expressing disapprobation or dissent. What constitutes a protest in each case depends upon the facts which embody it. It is true that in the case of Greenport Basin & Construction Co. v. United States, 260 U. S. 512, the United States Supreme Court seems to have upheld the view of the lower court that a claim for abatement amounted to a protest, but it is to be observed here that visiting the plaintiff with knowledge of the law, it did not file a specific protest and it did not ask for an abatement. It simply requested a hearing by the commissioner on a matter that was entirely within the discretion of the commissioner to grant, upon the ground that otherwise it would be treated unfairly and called upon to pay taxes disproportionate to other companies in the same line of business. It was granted a refund not because it would have been illegally assessed had the commissioner refused to

grant it, because had he refused the plaintiff would have been without remedy, as the matter was within his discretion, even if it had filed a formal protest and a formal claim for a refund. Had the plaintiff been refused relief, even granting that its statement was a claim for a refund, it could not have on appeal secured relief in this court. So that, visiting the plaintiff with knowledge of the law, it is not to be supposed that it intended either to file a protest or a claim for a refund.

A request for a special assessment, therefore, under these circumstances, does not convey the idea, the thought, or conviction that it was intended as or was a protest, or a claim for a refund, since it is clear that neither one would have been of any benefit to it as far as the decision of the commis- [fol. 32] sioner was concerned. The commissioner made a special assessment and allowed it a refund. He did not allow but refused interest, and the plaintiff here is in effect asking the court to increase the allowance of the commissioner by allowing interest and passing upon his decision in a matter where his decision was final, and as to which this court has no jurisdiction. We think we are precluded under the decision in the Williamsport Wire Rope case, supra, from doing so, as to do so would be to change the amount found by the commissioner. More than that, we further are of opinion that section 1324 (a) does not apply to a request for a special assessment but only to claims where the action of the commissioner is subject to review by this court. The plaintiff by the assessment under its return had not been illegally assessed as to its invested capital, for the decision of the commissioner was final and legal.

But, aside from this, we are of the opinion that the request for a hearing and the subsequent statement filed do not constitute a protest within the meaning of the act. It is something different from a request for an abatement. It is merely a request to the commissioner to take some action in a matter where his decision was final. For the same reason we think it was not a claim for a refund. Further, the taxes had not been paid, the commissioner had indicated an intention to consider the plaintiff's suggestion, and the plaintiff was simply filing facts embodying its suggestion for consideration. There is nothing to show what amount

was claimed or just how an amount could be arrived at. It was not known what the decision of the commissioner would be and it must have known that should the decision be adverse to it it could not recover on a claim as for refusing a refund.

In Kings County Savings Institution v. Blair, 116 U. S. 200, it was held that a claim for a refund could not be legally made until after the taxes had been paid. This asserted claim was filed simultaneously with the return, and the taxes were not paid until June 20, 1918. We are of the opinion that the plaintiff is not entitled to recover under its contention numbered 2 above. The plaintiff is entitled to recover under its contention numbered 1, as set forth above, interest on the sum of $1,731.50 from November 14, 1917, to May 9, 1922. Let judgment be entered accordingly.

WILLIAMS, Judge, and LITTLETON, Judge, did not hear and took no part in the decision of this case.

GREEN, Judge, and BOOTH, Chief Justice, concur.

[fol. 33] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 9th day of December, A. D. 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States interest on One thousand seven hundred thirty-one dollars and fifty cents ($1,731.50) at the rate of 6% per annum from November 14, 1917, to May 9, 1922.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On February 6, 1930, the plaintiff filed a motion for a new trial.

On April 7, 1930, the court entered the following order on said motion:

Order

It is ordered this 7th day of April, 1930, that the plaintiff's motion for a new trial be and the same is overruled.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,185. Court of Claims. Term No. 263. Maas & Waldstein Company, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed July 7, 1930. File No. 35,185.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 263

JUL 7 1930

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

MAAS & WALDSTEIN COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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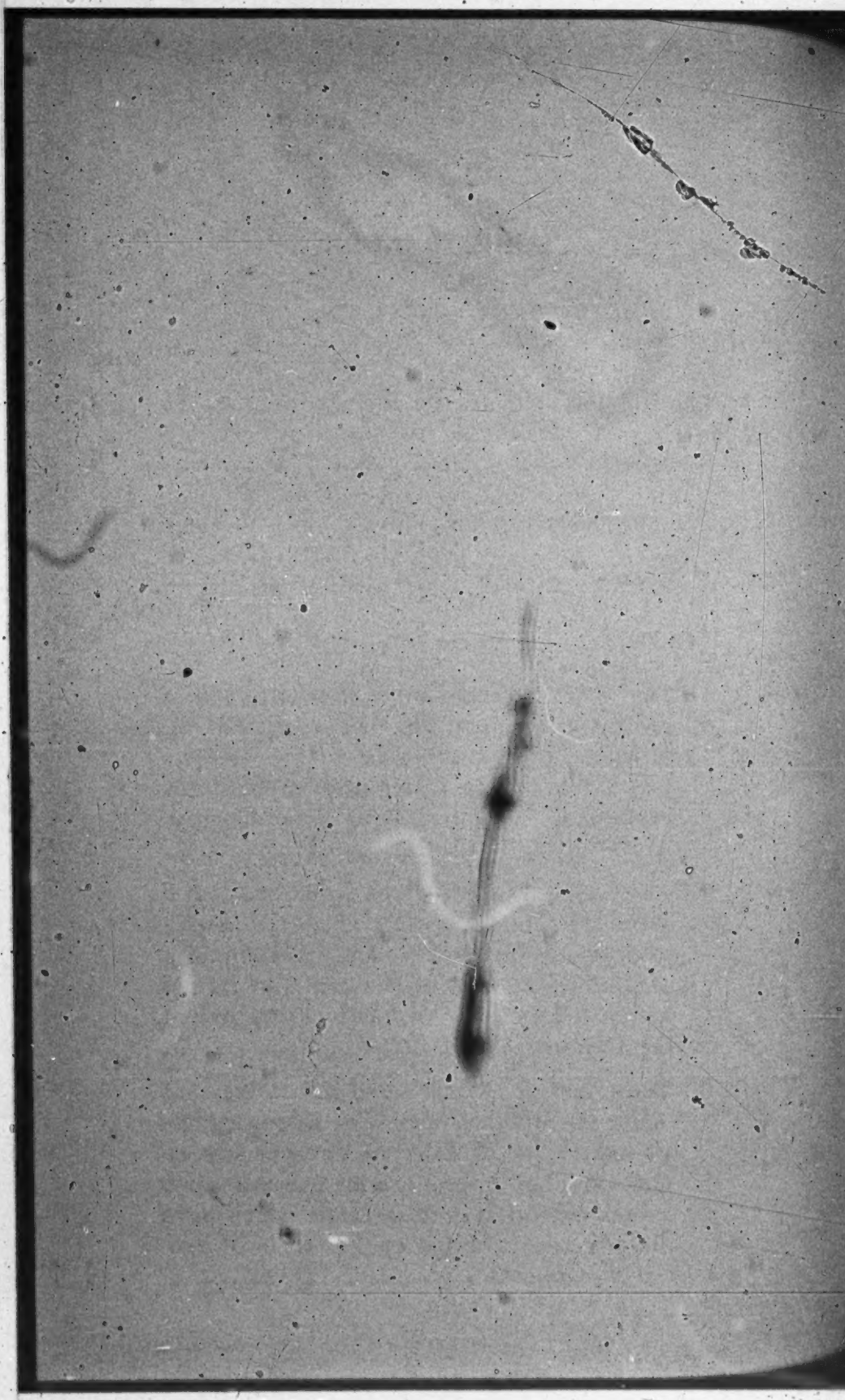

SUBJECT INDEX.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1930.

MAAS & WALDSTEIN COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

The Opinion of the Court Below.

The volume of the Court of Claims Reports which will contain the opinion delivered in the Court below has not yet been published. The case is reported in 37 F. (2d) 196.

II.

Statement.

The jurisdiction of this Court is invoked on the following grounds:

(1) The judgment to be reviewed was originally entered December 9, 1929. The petitioner moved for a new trial,

which motion was submitted February 6, 1930, and denied April 7, 1930. Time to apply for a writ of certiorari therefore runs from April 7, 1930. *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U. S. 448, 450; *Morse* v. *United States*, 270 U. S. 151, 153.

(2) In this case petitioner sued in the Court of Claims to recover from the United States interest on income and excess profits taxes from the date the taxes were paid to the date on which the taxes were refunded to the petitioner, the refund being based upon the granting of special assessment under Section 210 of the Revenue Act of 1917. Petitioner's claim to interest was based on Section 1324(a) of the Revenue Act of 1921. The Court of Claims denied petitioner's claim.

(3) The Court of Claims had jurisdiction of this claim under Section 145 of the Judicial Code. This Court has jurisdiction to grant certiorari under Section 240 of the Judicial Code, Section 3, Sub-division B, as amended February 13, 1925, 43 Stat. 938.

III.

The Question Involved.

The question immediately presented by the decision of the Court of Claims in this case is whether Section 1324(a) of the Revenue Act of 1921 authorizes the payment of interest on a refund in a case where the refund is based upon special assessment under Section 210 of the Revenue Act of 1917, or the like provisions of Sections 327 and 328 of the Revenue Act of 1918. In reaching its decision on this question, the Court of Claims held (1) that Congress, in enacting Section 1324(a), intended to confine the allowance of

interest to claims for refunds of taxes which are enforceable in court; and (2) that the decision of this Court in the case of *Williamsport Wire Rope Co.* v. *U. S.*, 277 U. S. 551, precludes the allowance of interest on a claim for refund based on special assessment under Section 210 of the Revenue Act of 1917. The correctness of these holdings is, therefore, also involved in this case.

IV.

Assignments of Error.

1. The Court of Claims erred in holding that a protest based upon the right to special assessment under Section 210 of the Revenue Act of 1917 could not be a protest within the meaning of Section 1324 (a) of the Revenue Act of 1921.

2. The Court of Claims erred in holding that a claim for refund based upon special assessment under Section 210 of the Revenue Act of 1917 could not be a claim for refund within the meaning of Section 1324 (a) of the Revenue Act of 1921.

3. The Court of Claims erred in holding that under the Williamsport Wire Rope case the Commissioner of Internal Revenue has an unreviewable discretion in passing upon claims for interest on refunds which have already been granted on the basis of special assessment.

4. The Court of Claims has erroneously treated the right to interest under Section 1324 (a) of the Revenue Act of 1921 as merely an incident to the recovery of the principal amount of a refund, in direct conflict with the decision of this Court in the Girard Trust Company case.

5. The Court of Claims flagrantly disregarded the rule that Revenue Acts are to be liberally construed in favor of taxpayers.

6. The Court of Claims ignored its own finding that a formal claim for refund was filed after payment of the tax.

V.

Argument.

1. The Court of Claims erred in holding that a protest based upon the right to special assessment under Section 210 of the Revenue Act of 1917 could not be a protest within the meaning of Section 1324 (a) of the Revenue Act of 1921.

The Court of Claims takes the view that a protest based on a claim for special assessment cannot be regarded as a real protest, because a protest against the Commissioner's conclusion or decision on the question of special assessment would be futile. The Court of Claims said in its opinion (37 F. (2d) at 199):

> "Section 210 is not a taxing statute, and a protest against the Commissioner's conclusion or decision under it would be futile, and, even if it were made, would not entitle the plaintiff to relief in this court on account of either failure to make a special assessment or from an assessment which had been made and was unsatisfactory to the taxpayer, or a refusal to make a special assessment or make any change with regard to the plaintiff's invested capital, leaving it as under the return."

As a matter of fact, the protest which the petitioner made was not a protest against the action of the Commis-

sioner under Section 210. The protest which the petitioner made at the time of payment of the tax was against assessment under Section *201* of the statute. It protested against assessment under Section *201* and specified that it was entitled to assessment under Section *210*. The protest was not against the determination of the Commissioner under Section 210, which had not yet been made, but for the purpose of requesting the Commissioner to make such determination.

And this protest was by no means futile, either in theory or in fact. The statute provided a specific and adequate remedy for those aggrieved under Section 201, if they believed themselves to be within the provisions of Section 210. They had the right to appeal to the Secretary of the Treasury himself for the determination of their claim. This right of appeal has been successfully availed of by hundreds of taxpayers and has resulted in the refund of millions of dollars of taxes. In the instant case, the protest against assessment under Section 201 was in fact anything but futile. It was highly effective. It resulted in a favorable determination of its claim to special assessment by the tribunal appointed for that purpose by the statute, to wit: the Secretary of the Treasury, and the actual refund of $450,000 in taxes. It is indeed difficult to describe as futile that which produced such adequate and substantial results.

It is true that if the taxpayer had protested against the determination of the Commissioner *under Section 210*, as the Court of Claims apparently thought it did, such protest would have been futile *so far as affording a basis for suit in the Court of Claims.* But the petitioner was not protesting against such determination; it was protesting against assessment *under Section 201* and with highly suc-

cessful results. The Commissioner's discretion was exercised in its favor. He found the tax paid was excessive and that the plaintiff was entitled to a refund. Against that decision the petitioner is not protesting in this Court. It is asserting that its tax having been found to have been overpaid, it is entitled to interest on the excessive amount withheld by the Government. Its right to such interest rests on Section 1324 of the 1921 Act and not on Section 210 of the 1917 Act.

The Court of Claims apparently assumes that the purpose of the protest required by Section 1324 (a) of the Revenue Act of 1921 was to lay the basis for suit. There is certainly no grounds for reading such a qualification into a term which has been used by Congress in a contrary sense for almost ninety years. Congress has consistently and repeatedly over a period of almost ninety years used the word "protest" in connection with claims which were not enforceable in court. Every tariff act since the Act of 1842 has made protest a condition precedent to the recovery of duties wrongfully collected. At the same time, every one of these tariff acts limited the right of recovery of duties in the case of erroneous appraisal to a proceeding before the statutory appraisers, with no right of appeal to the courts. Congress required a protest in these cases although forbidding suit. See *Bartlett* v. *Kane*, 16 How. 233, 272; *Hilton* v. *Merritt*, 110 U. S. 97, 105, and *Passavant* v. *U. S.*, 148 U. S. 214. The Court of Claims would now import to Congress, after almost ninety years of expressing a contrary intention, an intent that protest implies a right to court action.

This Court has itself explained the purpose of the protest required by Section 1324 (a) of the Revenue Act of

1921. In the case of *Girard Trust Company* v. *United States*, 270 U. S. 163, 172, Chief Justice Taft explained the term as follows:

> "A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once."

There is no suggestion that the protest must be upon some ground which would furnish the basis of a court action. It is submitted that the decision of the Court of Claims conflicts with the view taken by this Court in the *Girard Trust Company* case.

2. The Court of Claims erred in holding that a claim for refund based upon special assessment under Section 210 of the Revenue Act of 1917 could not be a claim for refund within the meaning of Section 1324 (a) of the Revenue Act of 1921.

The Court of Claims also takes the view that the claim for refund referred to in Section 1324 (a) of the Revenue Act of 1921 must be a claim which is enforceable in court. It is submitted that there is no basis for this limitation. There is a wide variety of claims against the United States which are not enforceable in court, although they may be prosecuted before non-judicial tribunals. A claim for refund of taxes is but one form of claim against the government. No claim against a sovereign can be enforced except in the tribunal which the sovereign designates. The Court of Claims is but one of several tribunals which the United States in the exercise of its sovereign discretion has designated for the enforcing of claims against it. Some of these tribunals are judicial and some are administrative. Thus,

claims for compensation under the Act of March 3, 1885, were held by this Court, in *United States* v. *Babcock,* 250 U. S. 328, to be enforceable only before the Treasury Department. Claims for postal compensation under the Act of March 4, 1913, were held by this Court in *United States* v. *Atchison, T. & S. F. Ry. Co.,* 249 U. S. 451, to be enforceable only before the Postmaster General. Claims for compensation under the War Risk Insurance Act were held by this Court in *Silberschein* v. *U. S.,* 266 U. S. 221, to be enforceable only before the Director of the Veterans Bureaus. And claims for the recovery of duties paid based on erroneous appraisal are enforceable only before the appraiser. *Bartlett* v. *Kane, supra; Hilton* v. *Merritt, supra; Passavant* v. *United States, supra.*

The term "claim for refund" as used in other parts of the Revenue Act, and as universally understood by the Department and the taxpayers, includes a claim for refund based upon special assessment. Section 252 of the Revenue Act of 1921 provides a limitation of the time within which a refund may be made. This limitation is contained in the first proviso of that section, which reads as follows:

> "Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a *claim therefor* is filed by the taxpayer." (Italics ours.)

We feel safe in asserting that no one would ever suggest that the claim for refund referred to in this proviso does not include a claim for refund based upon special assessment under Section 210. The Department has regularly made refunds based upon special assessment after the period of limitations provided in the Revenue Act of 1921

and succeeding acts, if a claim for refund was filed within the period. The only basis upon which a refund may be granted after the expiration of the limitations period is that a claim for refund has been filed within the period. The universal practice of the Department in treating claims for refund based upon special assessment as real claims for refund within the meaning of Section 252 of the Revenue Act of 1921 and similar provisions of succeeding Acts is persuasive authority. If the Court of Claims is correct that a claim for refund means a claim enforceable in court, the Treasury Department has refunded and is continuing to refund millions of dollars of taxes without authority and contrary to the statute.

3. The Court of Claims erred in holding that under the Williamsport Wire Rope case the Commissioner of Internal Revenue has an unreviewable discretion in passing upon claims for interest on refunds which have already been granted on the basis of special assessments.

The *Williamsport Wire Rope* case, *supra*, has no application to the question of the right of interest under Section 1324 (a). The Court of Claims erred in assuming that it has any effect, and the error at the basis of the Court's decision is largely summed up in the following quotation from the opinion of the Court (37 F. (2d) at 200):

> "The Commissioner made a special assessment and allowed it a refund. He did not allow but refused interest, and the plaintiff here is in effect asking the court to increase the allowance of the Commissioner by allowing interest and passing upon his decision in a matter where his decision was final, and as to which this court has no jurisdiction. We think *we are precluded under the decision in the Williams-*

port Wire Rope Case, supra, from doing so, as to do so would be to change the amount found by the Commissioner." (Italics ours.)

Of course plaintiff is not seeking to change the amount of the refund found by the Commissioner to be due pursuant to Section 210. The Commissioner's action in determining, under Section 210 of the Revenue Act of 1917, the amount of an overassessment may be an administrative matter involving such complications in presentation and proof as not to be generally subject to review by a court in suits for refund under the Court of Claims Act or the Tucker Act, or in a suit against a collector. But where the Commissioner has made such a determination, and as a result thereof and under the authority of other statutory provisions a refund has been made, as it has been made in this case, the question as to whether interest should be paid thereon, and if so in what amount, is governed by Section 1324 (a) of the Revenue Act of 1921.

The right to interest on the allowance of a claim for refund is a separate and self-subsisting right given by a statute enacted after, and independent of, the Revenue Act of 1917 and Section 210 thereof. It is a right which continues to exist even when the right to the refund is extinguished by payment. *Girard Trust Company* v. *United States, supra.* It is not even like the right to interest which is incidental to taxes recovered from a collector, as in the case of *Stewart* v. *Barnes,* 153 U. S. 456 (1894). *Girard Trust Company* v. *United States, supra.* And the application of the statute giving this right involves none of the complicated administrative determinations involved in the application of Section 210. It is a pure question of statutory construction and simple arithmetic, once the

amount of refund has been determined. The only possibility for the exercise of any administrative discretion comes in the allowance of the refund. Once the refund is allowed, the Commissioner has determined what amount of money was wrongfully withheld from the taxpayer by the Government. Congress has determined by clear and simple legislative enactment what the Government shall pay for the wrongful retention of this money. The allowance of interest under Section 1324 (a) of the Revenue Act of 1921 is just as simple a ministerial act where the refund is based upon special assessment as where it is based upon any other grounds, and would even be subject to the writ of mandamus. *Cf. Blair* v. *United States, ex rel. Birkenstock*, 271 U. S. 348 (1926).

4. The Court of Claims has erroneously treated the right to interest under Section 1324 (a) of the Revenue Act of 1921 as merely an incident to the recovery of the principal amount of a refund, in direct conflict with the decision of this Court in the Girard Trust Company case.

The Court of Claims continues to entertain the old error which caused the reversal of its decision by this Court in the *Girard Trust Company* case. In the *Girard Trust Company* case, the Court of Claims held that a suit could not be maintained for the recovery of interest on a refund under Section 1324 of the Revenue Act of 1921, where the principal amount of the refund had been paid. The Court of Claims treated the right to interest as merely an incident of the right to recover the principal, relying upon *Stewart* v. *Barnes, supra*. When the right to the principal was extinguished by payment, the Court of Claims thought that no independent action could be maintained for the recovery of interest which was only incidental to the principal. In

the case at bar, the Court of Claims falls into the same error by reasoning that, since the right to recover the principal amount of the refund could not be sued upon in court, an independent action for the recovery of interest, which is incidental to the principal, cannot be maintained. In the *Girard Trust Company* case an action could not have been maintained for the recovery of the principal for the reason that the right to the refund itself had been extinguished by payment. In the case at bar, an action could not have been brought in court for the recovery of the refund itself for the reason that the right was enforceable only before an administrative tribunal. In both cases the Court of Claims reasoned that since an action could not have been maintained in court for the recovery of the principal, an independent action could not be maintained for the recovery of the interest which the Court of Claims regarded as a mere incident to the recovery of the principal. It is submitted that the Court of Claims in the case at bar has fallen into the same old error of treating the right to interest under Section 1324 of the Revenue Act of 1921 as merely incidental to the recovery of the principal amount of the refund. The failure of the Court of Claims to recognize that this Section creates a separate and independent right which gives rise to an independent action is in direct conflict with the decision of this Court in the *Girard Trust Company* case.

5. The Court of Claims flagrantly disregarded the rule that Revenue Acts are to be liberally construed in favor of taxpayers.

We submit that there is nothing in the language of Section 1324 (a) of the Revenue Act of 1921, either taken alone or considered in connection with any other portions of the

Act, which could, except upon a most strained construction, be held to deny interest to a taxpayer receiving a refund upon the basis of special assessment. Taking this position, the Court of Claims has disregarded the rule that all the provisions of taxing statutes are to be construed in all respects most strongly in favor of the taxpayers. This Court has held that this rule applies even where the question involved is whether the Government is barred from collecting the tax by the limitations provisions contained in the taxing statute. *Bowers* v. *New York and Albany Lighterage Company,* 273 U. S. 346 (1927); *United States* v. *Updike, et al.,* U. S. Sup. Ct., decided May 19, 1930, 74 L. Ed. Adv. Ops. 536, 539.

The rule of liberal construction should be much more freely applied to a remedial section such as Section 1324 (a) of the Revenue Act of 1921. All that section does is to provide for paying to the taxpayer interest for the use of money collected from him in excess of the amount properly due. It is certainly fair that it should be paid to him in all cases where he has notified the collecting officers at the time of the collection that an excessive amount is being collected and has stated his reasons therefor and has then filed claim upon the same grounds and had the claim allowed.

When Congress came to enact the Revenue Act of 1924, it determined that even where no protest was made at the time of payment, and where no claim for refund was subsequently filed, interest shall be paid from the date of any overpayment of tax upon the amount refunded. In the report of the Finance Committee of the Senate on the Revenue Act of 1924, Senate Report No. 398, 68th Congress, 1st Session, page 46, this discussion of the interest provisions of the 1924 Act appears:

"Under the existing law, there are similar provisions in subdivision (a) of Section 1324. There is one principal change: The elimination of the requirement of a protest, or of the filing of a claim for refund or credit as a condition precedent to the allowance of interest. If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the period of their retention; and that the fact of protest or a claim does not affect the merits of such an interest payment."

In the case of *United States* v. *Magnolia Petroleum Company*, 276 U. S. 160 (1928), it was held that Section 1019 of the Revenue Act of 1924 is not retroactive to refunds allowed prior to its passage. On the other hand, this subsequent action of Congress is certainly most significant and should most assuredly incline this Court to a liberal interpretation of previous acts in favor of the taxpayer and against any technical and strained construction as to protest and claim for refund. Judge Brewster of the United States District Court for the District of Massachusetts in the case of *Boston Buick Co.* v. *United States*, 27 F. (2d) 395 (D. Mass. 1928), in reaching a decision in favor of the taxpayer on the question of the date of the allowance of a credit as affecting the amount of interest to be paid thereon, frankly stated, at page 396:

"I confess that I am somewhat moved to my conclusion by the feeling that the results are in harmony with the purposes and intent of Congress to fairly recompense taxpayers who have been deprived of the use of their money by illegal exactions of the Government, *as that intent and purpose is reflected in the later Act of 1924*". (Italics ours.)

6. The Court of Claims ignored its own finding that a formal claim for refund was filed after payment of the tax.

As a final ground for its decision in this case the Court of Claims relied upon the proposition that the purported claim for refund in this case was filed before the payment of the tax and could therefore not be considered a real claim for refund. The opinion of the Court of Claims ends with the following language:

> "In *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 6 S. Ct., 353, 29 L. Ed. 657, it was held that a claim for refund could not be legally made until after the taxes had been paid. This asserted claim was filed simultaneously with the return, and the taxes were not paid until June 20, 1918."

However, in the special findings of fact made by the Court of Claims and set out at the beginning of the report of the case, it appears that the petitioner filed a formal claim for refund after payment of the tax. See Finding No. XI.

Conclusion.

The essence of the petitioner's case is this: Petitioner was compelled by law to make its return and pay its tax in the first instance under Section 201 of the Revenue Act of 1917. Article 24 of Regulations 41 of the Treasury Department provided:

> "In every case of a trade or business having invested capital a return shall be made in the first instance in accordance with Article 21 or 23, but the taxpayer may submit therewith a statement of reasons why in his opinion the tax should be assessed in accordance with this article."

The obvious purpose of this regulation was to assess all taxpayers having invested capital under Section 201, and to prescribe the sole method by which the taxpayer should protest against such assessment and give notice to the taxing officers of its claim to special assessment under Section 210, in order, to quote the language of this Court, that the taxing officers might "take remedial measures at once."

The petitioner complied scrupulously with these regulations. It made its return under Section 201, submitted therewith a statement of reasons why in its opinion it should be assessed under Section 210 rather than Section 201 and requested such assessment. It was assessed under Section 201 and paid its tax thereunder, at the same time repeating its protest against such assessment under Section 201 by again requesting assessment under Section 210.

This course of action constituted a complete and exact compliance with the definition and requirements of protest as prescribed by the Treasury Department in its own regulations and by this Court in the *Girard Trust Company* case, *supra*.

The protest was the foundation of a claim against the Government—a claim for special assessment under Section 210. The Secretary of the Treasury was designated by Congress as the tribunal before whom such claims should be decided. The Secretary of the Treasury entertained the claim, decided in favor of the plaintiff and allowed a refund.

There is not a word in Section 1324 (a) expressly stating or even indicating that the "claim for the refund" referred to must be enforceable in court. Such a conclusion cannot be implied. Congress has repeatedly and consistently in all tariff acts since 1842 required protest in connection with claims for the refund of taxes reviewable

by an administrative tribunal and not enforceable in court. To now hold that Congress, in using the word "protest" in Section 1324 (a) in connection with claims for the refund of taxes, intended to exclude all claims not enforceable in court is to run directly counter to the intention and meaning of Congress continuously expressed over a period of almost ninety years.

It is respectfully urged that this petition be granted in order that the erroneous interpretation by the Court of Claims of Section 1324 (a) and of this court's decision in the *Williamsport Wire Rope* case may be corrected, and in order that doubts as to the validity of refunds of millions of dollars of taxes may be dissipated.

Respectfully submitted,

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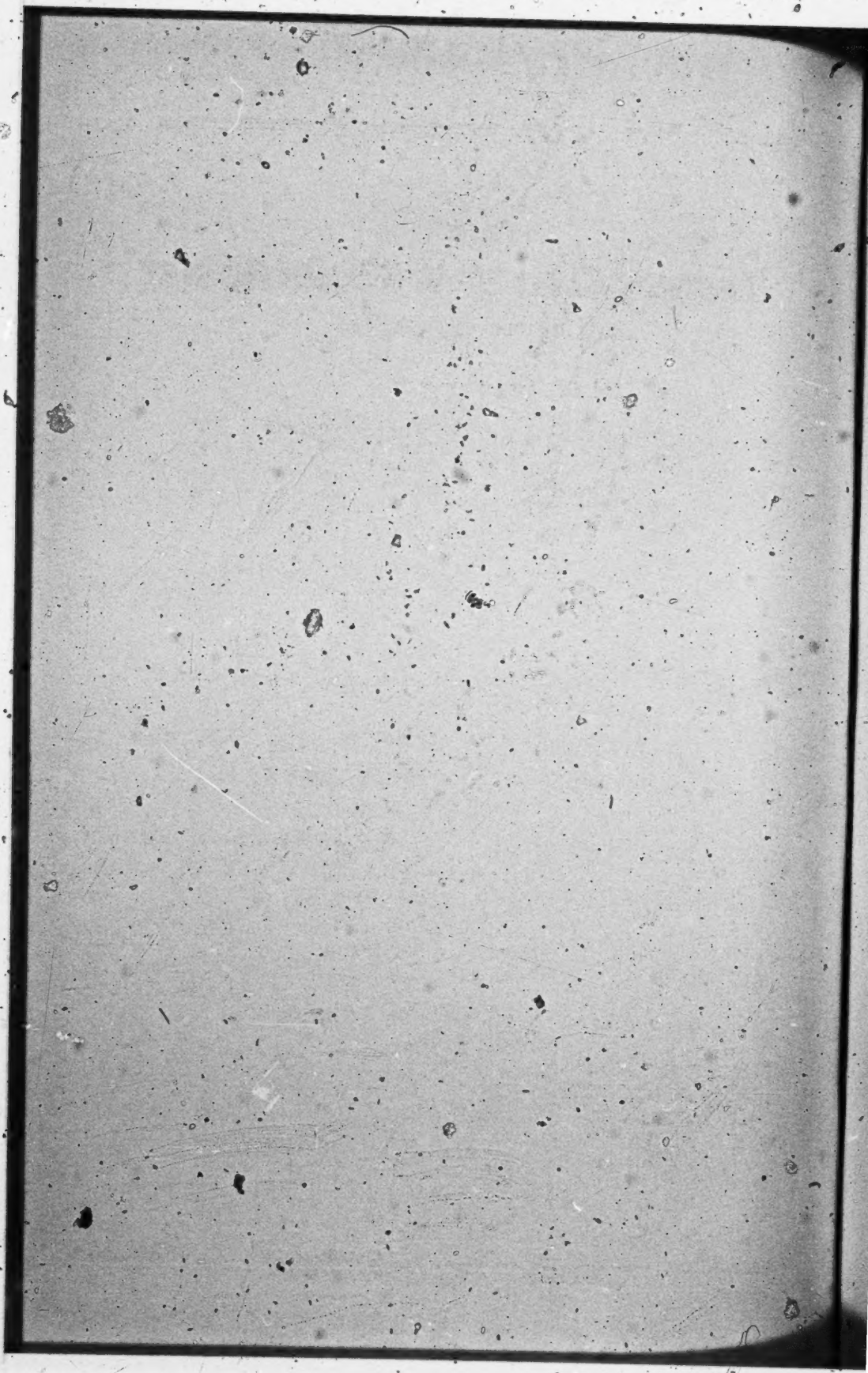

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

NUMBER 263.

MAAS & WALDSTEIN COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER.

In its brief in opposition to the grant of the writ, the Government attempts to support the final result reached by the Court of Claims without accepting the reasoning by which that Court reached its result. The following admission is found on page 6 of the Government's brief:

> "The reasoning of the Court as to these points does not seem clear and we do not support it, but the result, we submit, is correct."

However, in supporting the result of the case, the Government's brief is tainted with one of the principal errors made by the Court of Claims. The Court of Claims held that the taxes refunded were not *illegally collected*, and that for that reason there could be no *protest*. This holding is expressed in the following language taken from the opinion of the Court:

> "It (plaintiff) was granted a refund not because it would have been illegally assessed had the commissioner refused to grant it, because had he refused the plaintiff would have been without remedy, as the matter was within his discretion, even if it had filed a formal protest and a formal claim for a refund. . . . A request for a special assessment, therefore, under these circumstances, does not convey the idea, the thought, or conviction that it was intended as or was a protest, or a claim for a refund, since it is clear that neither one would have been of any benefit to it as far as the decision of the commissioner was concerned. . . . The plaintiff by the assessment under its return had not been illegally assessed as to its invested capital, for the decision of the commissioner was final and legal" (R. 28, 29).

The same idea seems to be expressed in the brief for the United States in opposition to the writ of certiorari. The following is taken from page 5 of the brief for the United States:

> "The letters merely request a hearing on a matter entirely within the Commissioner's discretion, on the ground that unless special assessment is given, it would be *unfairly but legally* bound to pay taxes disproportionate to the taxes of other companies in the same line of business." (Italics ours.)

Both the opinion of the Court of Claims and the brief for the United States in this Court assume that a valid protest exists only where the tax protested against is illegal.

We do not concede that a claim for refund or a protest within the meaning of Section 1324(a) of the Revenue Act of 1921 involves any idea of illegality of the tax other than that on some ground some amount is legally refundable. Even granting, however, that the illegality of the tax refunded is an essential basis of a protest or a claim for refund within the meaning of Section 1324(a), this element is present in the case at bar.

We submit that if a taxpayer was entitled to have its tax assessed under Section 210 of the Revenue Act of 1917 the collection of a greater amount of tax, assessed under Section 201 of the Revenue Act of 1917, was illegal. The contrary position which is taken by the Court of Claims and by the Solicitor General in his brief in this Court is due to a misunderstanding of the nature of Section 210 and of the decision of this Court in the *Williamsport Wire Rope case*, 277 U S. 551. The *Williamsport Wire Rope case* held that an action could not be maintained in the Court of Claims for the refund of taxes based upon Section 210 of the Revenue Act of 1917 (or Sections 327 and 328 of the Revenue Act of 1918). The application of Section 210 was thus left to the administrative discretion of the Commissioner. But of course it was not denied that a taxpayer had a legal right to special assessment where his case fell within the provisions of Section 210. The enforcement of this legal right was simply left to an administrative tribunal rather than to a Court.

While there may be no right in a suit based upon a claim for refund to force the Commissioner to grant special

relief under Section 210, the Act is mandatory upon him to do so in the proper case. Section 210 provides:

> "That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction *shall be* the sum of an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction . . . for the same calendar year of representative corporations . . . engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, etc." (Italics ours.)

It should be noticed that it is not provided that the Secretary or Commissioner *may* in his discretion grant special assessment. On the contrary the law declares that when a certain condition exists the amount of the invested capital deduction *shall be* computed in the manner specified. If the facts of a taxpayer's case bring it within the terms of this section, he is entitled legally, under this statutory provision, to special assessment. If the law gives him the right to special assessment, a greater amount of taxes collected from him on another basis is illegal and excessive. All that the *Williamsport Wire Rope case* holds is that the Commissioner or Secretary of the Treasury will generally have the final decision on the question whether a taxpayer is legally entitled to special assessment under this section, and, by the same step, whether the taxes collected without resort to Section 210 are excessive and illegal.

As was said by the Board of Tax Appeals in *Appeal of Davis*, 2 B. T. A., 328, after quoting Section 327 of the Revenue Act of 1918.

"In three of the four cases above, it is necessary for the Commissioner to determine certain facts which operate as conditions precedent to the application of Section 328, *but when these conditions precedent have been found by him the application of the statute is mandatory.* . . . Under these circumstances, we are of the opinion that, where the Commissioner has once found the antecedent circumstances, the provisions of Section 327 and 328 apply, and *the tax must be computed under the latter section.*" (Italics ours.)

The Government's argument really amounts to the proposition that since the Commissioner might have denied special assessment and decided that the taxes imposed under Section 201 were legally collected, no protest was possible. But this is a possibility which is present in every protest. The court, Commissioner or other tribunal which passes upon any protest or claim for refund may in any case deny the taxpayer's claim and hold that the taxes were legally collected. If the Government's reasoning is sound, there could never in any case be a valid protest against illegality because it may be ultimately determined by the Commissioner, judge or tribunal vested with final decision in the case that the taxes were not illegally collected!

The Government's brief also seems to make the point that the letters written by the petitioner did not contain the word "protest" or its equivalent; that they contained merely a request for a hearing but no "objection" to the payment of the tax.

The petitioner in the letters which it filed with the return (R. 8) and which it wrote to the Collector at the time of paying the tax (R. 10) said in substance and effect:

> "You have assessed us under Section 201; we claim that we should be assessed under Section 210 and request such assessment."

The Government apparently contends that because the petitioner did not add the express words "We protest against assessment under Section 201", it was not protesting against such assessment nor objecting to paying the tax assessed. Surely the assertion of a right to one form or rate of assessment is a protest or objection to a different form or rate. A request for assessment under Section 210 is a protest against assessment under Section 201.

This court has held that a protest need not contain the word "protest" or "objection". In *Greenport Basin & Construction Co.* v. *U. S.*, 260 U. S. 512, a claim for abatement filed before payment of the tax was recognized as a valid protest. A claim for abatement (Treasury Department Form 843) nowhere contains the word "protest" or "objection". Nor does it contain any statement that the assessment is illegal. It is, in fact, interesting to note that the language used is substantially identical with that used by the petitioner in this case. Line 4 of Form 843 (claim for abatement) reads: "Reduction of Tax hereby *Requested*" (italics ours). This is the exact word which the petitioner used and to which the Government is now objecting.

The argument contained on page 6 of the Government's brief to the effect that the request for special assessment was not a claim for refund is directed against an alternative contention raised by the petitioner in the lower court but not pressed here. The Government admits on page 5 of its brief that a formal claim for refund was filed on December 30, 1921. This is in accord with special findings

of fact No. XI (R. 21). This leaves the question of protest as the sole question for decision.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 263

MAAS & WALDSTEIN COMPANY, *Petitioner*,
vs.
THE UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the court below is reported in 68 Court of Claims Reports 613 and 37 Fed. (2d) 196.

JURISDICTION

The judgment to be reviewed was originally entered by the Court of Claims December 9, 1929. (R. 30). The petitioner moved for a new trial, which motion was sub-

mitted February 6, 1930, and denied April 7, 1930, (R. 30). Petition for writ of certiorari was filed July 7, 1930 (R. 31). Jurisdiction to issue the writ was conferred on this Court by 28 U. S. C. A. Par. 288, as amended February 13, 1925, 43 Stat. 939. The writ was granted October 13, 1930.

STATEMENT OF FACTS

The petition to the Court of Claims requested interest on an overpayment of income tax in the amount of $2,476.23 for the year 1916 and on an overpayment of income and excess profits taxes in the amount of $462,038.34 for the year 1917 (R. 1). The Court of Claims held that the petitioner was entitled to interest on $1,731.50 of the 1916 overpayment and was entitled to no interest on the 1917 overpayment (R. 25). The petitioner subsequently abandoned its claim for interest on the remainder of the 1916 overpayment. Therefore, the facts set forth in this brief will relate only to the petitioner's claim for interest on the 1917 overpayment, as that is the only question now in dispute.

Petitioner filed it corporation income and excess profits tax return for the year 1917 on March 28, 1918, showing a total tax due thereon of $1,508,400.25. This tax was paid on June 20, 1918 (R. 20). Petitioner attached to its tax returns for the year 1917 a letter dated March 28, 1918, in which petitioner set forth its reasons why the tax should be computed under the provisions of articles 52, 18 and 24, regulations 41, revenue act of 1917 the (so-called "special relief" provisions) (R. 21). At the time the petitioner paid its 1917 income and excess profits taxes it forwarded to the Collector of Internal Revenue a letter reiterating its application for special relief (R. 21). On December 30, 1921 the petitioner filed with the Collector of Internal Revenue for the Second District of New York a claim for refund of $462,287.07 income and excess profits taxes overpaid for the year 1917 (R. 21). On April 15, 1922 the Commissioner approved the schedule of overassessments which included

an overassessment of income and excess profits taxes in favor of petitioner in the sum of $462,038.34 for the year 1917 (R. 22). This overassessment resulted from the granting by the Commissioner of Internal Revenue of the petitioner's prior request for special relief under the provisions of section 210 of the revenue act of 1917 and articles 18, 24 and 52 of regulations 41. (See Taxpayer's Exhibit No. 7—R. 13). The Collector of Internal Revenue credited part of the overpayment of 1917 taxes in the sum of $462,038.34 against an underpayment of the munitions manufacturers' tax in the sum of $8,642.16 for the year 1917 leaving an amount to be refunded in the sum of $453,396.18 (R. 23). The schedule of refunds for the refunding of $453,396.18 was signed by the Commissioner of Internal Revenue on May 9, 1922, and a warrant for this amount was thereafter issued to the petitioner (R. 24).

The Commissioner of Internal Revenue subsequently determined that the petitioner's munitions manufacturers' tax for the year 1917 had been overpaid by the amount of $20,520.00 and signed a schedule refunding that amount to the petitioner under date of August 3, 1922 (R. 24). Under date of June 14, 1922, the Commissioner of Internal Revenue mailed a letter to the petitioner advising that a re-examination of petitioner's income and excess profits tax returns for the year 1917 disclosed that the tax for that year had been underpaid by $4,696.97 and in August, 1922, made an additional assessment against the petitioner for the said year in the sum of $4,696.97 (R. 24). Therefore, the net overpayment of income and excess profits taxes for the year 1917 amounted to $457,341.37 ($462,038.34 less $4,696.97). The Commissioner of Internal Revenue refused to allow any interest on this refund (R. 24). The petitioner thereupon petitioned the Court of Claims to allow interest on this amount of $457,341.37, but the Court of Claims denied this claim.

QUESTION

The question is whether petitioner is entitled to interest on the refund of $457,341.37 under the provisions of Section 1324, (a) (1) of the Revenue Act of 1921.

Section 1324 (a) (1) reads as follows:

> "Section 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid."

In the court below the petitioner originally raised the point that even if it had filed no specific protest, the request for special assessment amounted to an informal claim for refund and that therefore, in any event, the petitioner was entitled to interest from six months after the date of filing such claim to the date of the allowance of the claim. This point was based on sub-section (a) (3) of Section 1324, which reads as follows:

> "Section 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance as follows: * * *
>
> "(3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit." * * *

The petitioner is not pressing this alternative suggestion before this court, and is resting its claim for interest solely

on the proposition that a specific protest was made by the petitioner and it is therefore entitled to interest under the provisions of section 1324 (a) (1) of the Revenue Act of 1921. The petitioner does not rely on section 1324 (a) (3). In considering the opinion of the Court of Claims it is necessary to keep this in mind, because the Court of Claims devotes a portion of its opinion to disposing of the question as to whether the application for special relief amounted to a claim for refund. It must not be forgotten, however, that an actual formal claim for refund was filed by the taxpayer after the payment of the tax. (See Finding No. XI; R. 21.)

OPINION OF COURT OF CLAIMS

An analysis of the Court of Claims' opinion, which is adverse to petitioner's contention, shows that it is based on two main propositions:

1. The taxpayer did not make a sufficient protest under section 1324 (a);

2. Congress did not intend under section 1324 (a) to allow any interest on a refund where that refund was based on the application of the so-called "special relief" provisions of Section 210 of the Revenue Act of 1917.

POINT I

The Court of Claims erred in holding that petitioner made no specific protest.

Prior to and in connection with the payment of its 1917 tax, the petitioner addressed to the Commissioner of Internal Revenue three letters dated February 5, 1918 (R. 7), March 28, 1918 (R. 8), and June 14, 1918 (R. 10). The letter of March 28, 1918, contained the following:

> "Our net income for the taxable year was $2,656,-395.01. We are therefore required to pay in the above taxes substantially 66% of our net income. Of the total amount of the Excess Profits Tax, substantially

83% is assessed at the 60% rate, in addition to which we are required to pay over $242,000 for the Munitions Manufacturers' Tax.

"It is our opinion that our tax is proportionately larger than that of other representative concerns in the same line of business. It is our further opinion that this disproportion arises from causes of the nature of those specified in Article 52, of Regulations No. 41, for the following reasons:

"1. Under paragraph 3, Article 52, it is our belief that through the simple form and manner of our organization we are placed at a disadvantage in comparison with representative concerns in a similar trade or business. In accordance with the regulations applying to Excess Profits Tax Returns, we have reduced the value of the tangible assets acquired at the time of our organization to $100,000. No proper evidence of the actual value of these assets when acquired by the corporation is now in existence, but it is our opinion that their actual value was far in excess of $100,000. By reason of our organization, it has been possible to make our return in strict accord with the law and the regulations. We believe that this fact places us at a disadvantage with concerns which, by reason of the manner of their organization, and by reason of reorganizations through which they may have passed, are not able to correct their capital account in the manner provided in the regulations.

"2. Under paragraph 4, Article 52, our invested capital, when computed in the manner specified in the regulations, is manifestly seriously disproportionate to the taxable income. This arises in part for the reasons specified in the preceding paragraph, and in part for the reason specified under (b) in paragraph 4. About 90% of our total net income was earned through the operation of our gun cotton plant. This plant was erected solely for war purposes to meet the needs of a foreign government and will not be wanted for the purpose of our trade or business after the termination of the war. Under the regulations it has not been possible to properly allow for the amortization and exceptional depreciation of this plant.

"Upon the above statement, which we are prepared to support and amplify if required, we request assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41."

The letter of June 14, 1918 which was addressed to the Collector of Internal Revenue at New York read in part as follows:

> "Dear Sir:
>
> Enclosed you will please find check which is tendered in accordance with notices of assessment received.
>
> Together with our returns for corporation income tax, excess profits tax, and munitions tax, we filed a request dated May 28th, for assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations 41.
>
> Understanding that these questions will be passed upon at a later date, we shall be pleased to be advised that a hearing will be granted to us" (R. 10).

Did the foregoing letters constitute a specific protest within the meaning of section 1324 (a) (1)?

The word "protest" is defined in Funk & Wagnall's New Standard Dictionary as:

> "A declartion of dissent from an act done or about to be done, made to prevent the inference that by such act the declarant has relinquished a debt or *accepted a liability.*"

In Webster's Dictionary it is said:

> "A protest is a solemn declaration of opinion."

The obvious purpose of the taxpayer's letters, above quoted, was to prevent the inference that by paying the maximum tax the taxpayer accepted liability for such maximum tax,—which brings the letters within the Funk & Wagnall's definition of a protest. The taxpayer's letters certainly constituted a solemn declaration of opinion that an adjustment should be made by the Commissioner under the discretionary provisions of Section 210—thus coming within the definition given in Webster's Dictionary.

The Revenue Act of 1917 imposed a war excess profits tax at certain rates (Sec. 201) based on the taxpayer's invested capital (Sec. 207). Rules for the computation of such tax were laid down in the Act (Secs. 201 and 207) and amplified in Regulations 41 interpreting the statute. All taxpayers were compelled to make their returns and pay the tax on the basis of the statute as so interpreted by the Regulations.

The tax paid at the time of filing the return might be excessive either because

(a) The regulations improperly interpreted the statute, or

(b) The taxpayer might be one of a limited class of taxpayers who were entitled to a lower tax rate than that imposed by Sections 201 and 207.

The limited class of taxpayers referred to were those specified in Section 210 whose invested capital could not be satisfactorily determined by the Commissioner of Internal Revenue. Section 210 of the Revenue Act of 1917 gives a right to such limited class of taxpayers to have their taxes computed with reference to the tax of comparative corporations, since because of facts peculiar to them, their tax would otherwise be unduly in excess of the tax imposed on corporations under that Act.

In order to permit the Commissioner of Internal Revenue to determine whether the taxpayer comes within the limited class referred to and to facilitate comparison with other corporations the Commissioner provided in Regulations 41 that the taxpayer should first make a return as otherwise provided for and submit therewith a statement of reasons why in his opinion the tax should be assessed in accordance with this article. (Article 24 dealing with Section 210.)

Article 52 of the same regulations defines what the factors are which bring corporations within the limited class referred to.

Webster's definition of a protest as "solemn declaration of opinion" is particularly interesting, in view of the instructions to taxpayers contained in article 24 of regulations 41, the last paragraph of which reads (italics ours):

"In every case of a trade or business having invested capital a return shall be made in the first instance in accordance with Article 21 or 23, but the taxpayer may submit therewith a statement of reasons why *in his opinion* the tax should be assessed in accordance with this article."

It is obvious that a protest need not contain the word "protest" or "objection" and this court has, in effect, so held. In *Greenport Basin & Construction Co. v. U. S.*, 260 U. S. 512, a claim for abatement filed before payment of the tax was recognized as a valid protest. A claim for abatement (Treasury Department Form 843) nowhere contains the word "protest" or "objection." (See Exhibit A attached hereto.) Nor does it contain any statement that the assessment is illegal. It is, in fact, interesting to note that the language used is substantially identical with that used by the petitioner in this case. Line 4 of Form 843 (claim for abatement) reads: "Reduction of Tax hereby *Requested.*" (Italics ours.) This is the exact word which the petitioner used and to which the Government is now objecting.

In its letter of March 28, 1918 (R. 8) the petitioner said in part (italics ours):

"Upon the above statement which we are prepared to support and amplify if required, we *request* assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41."

It is a well-settled rule that where a taxpayer protests prior to the payment of the tax, it is not necessary that he repeat that protest at the time of paying the tax, in the absence of an acquiescence by the taxpayer prior to the date of payment.

In the case of *Hecht v. Malley* (276 Fed. 830). (2 Am. Fed. Tax Repts. 1564) decided December 3, 1921, the Court said:

"The only other question is whether the tax paid on July 26, 1919, amounting to $1,193 cannot be recov-

ered, because it does not explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment, or whether he did so and the protest and the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. *There can be no doubt that the collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him.*" * * * (Italics ours.)

The decision of the District Court was reversed on another point by the Circuit Court of Appeals (281 Fed. 363) (2 Am. Fed. Tax Repts. 1710). The decision of the Circuit Court of Appeals was in turn reversed in part by this Court (265 U. S. 144) (4 Am. Fed. Tax Repts. 3976). However, that part of the decision of the District Court set forth above was not reversed by either the Circuit Court of Appeals or this Court.

Certainly, the collector knew that this claimant objected to the excess profits tax computed under Sections 201 and 207 of the Revenue Act of 1917 and paid it only because it felt compelled to do so under the demand of the Collector.

The Court in the cases of *Greensport Basin & Construction Co. v. United States* (*supra*) and *Young v. United States* (269 Fed. 58) (2 Am. Fed. Tax Repts. 1289), decided November 18, 1920, held that where the taxpayer had filed a claim for abatement of the taxes, it was not necessary to protest at the time of actual payment. In that decision which was sustained by this Court (260 U. S. 512) (3 Am. Fed. Tax Repts. 3189), the Court said:

"Even if it were necessary to plead duress or protest, the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes

assessed before payment. This complies with every requisite of a payment under protest. Chesebrough v. U. S., 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432; City of Philadelphia v. Collector, 5 Wall. 720, 18 L. Ed. 614. The Government urges that it is necessary to make a protest at the time of actual payment, but it seems to the court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim."

The case of the petitioner is much stronger than that of the taxpayers in the above cases. There is nothing to indicate that the taxpayer in any of those cases referred to the previous protest at the time of payment, whereas in this case at the time of paying the tax, the petitioner expressly called the attention of the Collector to and re-affirmed its previous protest (R. 10). There can be no question as to whether the petitioner may or may not have acquiesced in the tax subsequent to its previous protests. The facts show that the petitioner did not acquiesce in it.

We take it that the word "specific" in the term "specific protest" above means to indicate that the protest should specify in detail the grounds of objection. This seems to be the view taken by this Court in the case of *Girard Trust Co. et al. v. United States* (270 U. S. 163) (5 Am. Fed. Tax Repts. 5846). The Court, speaking through Mr. Chief Justice Taft, stated:

"The government's contention is that the distinction made in section 1824, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.

"We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment, and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But, if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised."

The instant case certainly meets every test laid down by this Court in the above case. The petitioner furnished to the Collector a valid basis for the refund of its taxes. It invited the attention of the Collector to the illegality of the collection and furnished him data which would have enabled the Commissioner to have taken remedial measures at once, if he had been inclined to do so. *The fact that he waited almost four years before taking such remedial measures only emphasizes the justness of the petitioner's claim for interest.* It should be noted that when the Commissioner did act, he acted on the very grounds set out in the petitioner's protest. The following statement in the Certificate of Overassessment allowing the refund (Exhibit No. 7 of petition; R. 13) speaks for itself:

"You are advised that after careful consideration of all the facts, as set forth in the statements filed with your returns, together with other data submitted and in connection with the recommendation of the Committee on Appeals and Review, your excess profits tax has been computed under the provisions of Section 210 of the Revenue Act of 1917, and Articles 18, 24 and 52 of Regulations 41, which provide that an excess profits tax may be based upon a comparison with a group of concerns engaged in a like or similar line of business, which in their general character are comparable, as to the essential component parts influencing the tax liability, to your company.

"The result thus determined after giving effect to necessary changes in the net income, developed through audit of the returns, indicates an overassessment of

$462,038.34, specific details of which are as follows: * * *"

SUMMARY OF POINT I

The petitioner requested assessment under Section 210 of the Revenue Act of 1917. Surely this is a protest against assessment under sections 201 and 207, whether a protest be defined as

> "a solemn declaration of opinion" (Webster's Dictionary)

or as

> "a declaration of dissent from an act done or about to be done, made to prevent the inference that by such act the declarant has relinquished a debt or *accepted a liability.*"
> (Funk & Wagnall's New Standard Dictionary.)

Clearly, the assertion of a right to one form or rate of assessment is a protest against or objection to a different form or rate. A claim in abatement has been held to be a sufficient protest, although the word "protest" or "objection" is not used therein but only the word "requested," the very word used by this petitioner.

POINT II

The Court of Claims erred in holding that a protest based upon the right to special assessment under Section 210 of the Revenue Act of 1917 could not be a protest within the meaning of Section 1324 (a) of the Revenue Act of 1921.

The Court of Claims takes the view that a protest based on a claim for special assessment cannot be regarded as a real protest, because a protest against the Commissioner's conclusion or decision on the question of special assessment would be futile. The Court of Claims said in its opinion (R. 27):

"Section 210 is not a taxing statute, and a protest against the Commissioner's conclusion or decision under it would be futile, and, even if it were made, would not entitle the plaintiff to relief in this court on account of either failure to make a special assessment or from an assessment which had been made and was unsatisfactory to the taxpayer, or a refusal to make a special assessment or make any change with regard to the plaintiff's invested capital, leaving it as under the return."

As a matter of fact, the protest which the petitioner made was not a protest against the action of the Commissioner under Section 210. The protest which the petitioner made at the time of payment of the tax was against assessment under Sections 201 and 207 of the statute. It protested against assessment under Sections 201 and 207 and specified that it was entitled to assessment under Section 210. The protest was not against the determination of the Commissioner under Section 210 which had not yet been made, but for the purpose of requesting the Commissioner to make such determination.

And this protest was by no means futile, either in theory or in fact. The statute provided a specific and adequate remedy for those aggrieved under Sections 201 and 207, if they believed themselves to be within the provisions of Section 210. They had the right to appeal to the Secretary of the Treasury himself for the determination of their claim. This right of appeal has been successfully availed of by hundreds of taxpayers and has resulted in refund of millions of dollars of taxes. In the instant case, the protest against assessment under Sections 201 and 207 was in fact anything but futile. It was highly effective. It resulted in a favorable determination of its claim to special assessment by the tribunal appointed for that purpose by the statute, to wit: the Secretary of the Treasury, and the actual refund of $457,341.37 in taxes. It is indeed difficult to describe as futile that which produced such adequate and substantial results.

It is true that if the petitioner had protested against the

determination of the Commissioner *under Section 210*, as the Court of Claims apparently thought it did, such protest would have been futile *so far as affording a basis for suit in the Court of Claims*. But the petitioner was not protesting against such determination; it was protesting against assessment *under Sections 201 and 207* and with highly successful results. The Commissioner's discretion was exercised in its favor. He found the tax paid was excessive and that the petitioner was entitled to a refund. Against that decision the petitioner is not protesting in this Court. It is asserting that its tax having been found to have been overpaid, it is entitled to interest on the excessive amount withheld by the Government. Its right to such interest rests on Section 1324 of the 1921 Act and not on Section 210 of the 1917 Act.

The Court of Claims apparently assumes that the purpose of the protest required by Section 1324 (a) of the Revenue Act of 1921 was to lay the basis for suit. There is certainly no grounds for reading such a qualification into a term which has been used by Congress in a contrary sense for almost ninety years. Congress has consistently and repeatedly over a period of almost ninety years used the word "protest" in connection with claims which were not enforceable in court. Every tariff act since the Act of 1842 has made protest a condition precedent to the recovery of duties wrongfully collected. At the same time, every one of these tariff acts limited the right of recovery of duties in the case of erroneous appraisal to a proceeding before the statutory appraisers, with no right of appeal to the courts. Congress required a protest in these cases although forbidding suit. See *Bartlett* v. *Kane*, 16 How. 263, 272; *Hilton* v. *Merritt*, 110 U. S. 97, 105, and *Passavant* v. *U. S.*, 148 U. S. 214. The Court of Claims would now import to Congress, after almost ninety years of expressing a contrary intention, an intent that protest implies a right to court action.

This Court has itself explained the purpose of the protest required by Section 1324 (a) of the Revenue Act of 1921.

In the case of *Girard Trust Company* v. *United States*, supra, at page 172, Chief Justice Taft explained the term as follows:

> "A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once."

There is no suggestion here that the protest must be upon some ground which would furnish the basis of a court action. It is submitted that the decision of the Court of Claims conflicts with the view taken by this Court in the *Girard Trust Company* case.

POINT III

The Court of Claims erred in holding that a claim for refund based upon special assessment under Section 210 of the Revenue Act of 1917 could not be a claim for refund within the meaning of Section 1324 (a) of the Revenue Act of 1921.

The Court of Claims also takes the view that the claim for refund referred to in Section 1324 (a) of the Revenue Act of 1921 must be a claim which is enforceable in court. It is submitted that there is no basis for this limitation. There is a wide variety of claims against the United States which are not enforceable in court, although they may be prosecuted before non-judicial tribunals. A claim for refund of taxes is but one form of claim against the government. No claim against a sovereign can be enforced except in the tribunal which the sovereign designates. The Court of Claims is but one of several tribunals which the United States in the exercise of its sovereign discretion has designated for the enforcing of claims against it. Some of these tribunals are judicial and some are administrative. Thus, claims for compensation under the Act of March 3, 1885, were held by this Court, in *United States* v. *Babcock*, 250 U. S. 328, to be enforceable only before the Treasury De-

partment. Claims for postal compensation under the Act of March 4, 1913, were held by this Court in *United States* v. *Atchison T. & S. F. Ry. Co.*, 249 U. S. 451, to be enforceable only before the Postmaster General. Claims for compensation under the War Risk Insurance Act were held by this Court in *Silberschein* v. *U. S.*, 266 U. S. 221, to be enforceable only before the Director of the Veterans Bureau. And claims for the recovery of duties paid based on erroneous appraisal are enforceable only before the appraiser. *Bartlett* v. *Kane, supra; Hilton* v. *Merritt, supra; Passavant* v. *United States, supra.*

The term "claim for refund" as used in other parts of the Revenue Act, and as universally understood by the Department and the taxpayers, includes a claim for refund based upon special assessment. Section 252 of the Revenue Act of 1921 provides a limitation of the time within which a refund may be made. This limitation is contained in the first proviso of that section, which reads as follows:

> "Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a *claim* therefor is filed by the taxpayer." (Italics ours.)

We feel safe in asserting that no one would ever suggest that the claim for refund referred to in this proviso does not include a claim for refund based upon special assessment under Section 210. The Department has regularly made refunds based upon special assessment after the period of limitations provided in the Revenue Act of 1921 and succeeding acts, if a claim for refund was filed within the period. The only basis upon which a refund may be granted after the expiration of the limitations period is that a claim for refund has been filed within the period. The universal practice of the Department in treating claims for refund based upon special assessment as real claims for refund within the meaning of Section 252 of the Revenue Act of 1921 and similar provisions of succeeding Acts is

persuasive authority. If the Court of Claims is correct that a claim for refund means a claim enforceable in court, the Treasury Department has refunded and is continuing to refund millions of dollars of taxes without authority and contrary to the statute.

POINT IV

The Court of Claims erred in holding that under the Williamsport Wire Rope case the Commissioner of Internal Revenue has an unreviewable discretion in passing upon claims for interest on refunds which have already been granted on the basis of special assessment.

The case of *Williamsport Wire Rope Company* v. *U. S.*, 277 U. S. 551, has no application to the question of the right of interest under Section 1324 (a). The Court of Claims erred in assuming that it has any effect, and the error at the basis of the Court's decision is largely summed up in the following quotation from the opinion of the Court (R. 29).

> "The Commissioner made a special assessment and allowed it a refund. He did not allow but refused interest, and the plaintiff here is in effect asking the court to increase the allowance of the Commissioner by allowing interest and passing upon his decision in a matter where his decision was final, and as to which this court has no jurisdiction. We think *we are precluded under the decision in the Williamsport Wire Rope Case, supra, from doing so*, as to do so would be to change the amount found by the Commissioner." (Italics ours.)

Of course petitioner is not seeking to change the amount of the refund found by the Commissioner to be due pursuant to Section 210. The Commissioner's action in determining, under Section 210 of the Revenue Act of 1917, the amount of an overassessment may be an administrative

matter involving such complications in presentation and proof as not to be generally subject to review by a court in suits for refund under the Court of Claims Act or the Tucker Act, or in a suit against a collector. But where the Commissioner has made such a determination, and as a result thereof and under the authority of other statutory provisions a refund has been made, as it has been made in this case, the question as to whether interest should be paid thereon, and if so in what amount, is governed by Section 1324 (a) of the Revenue Act of 1921.

The right to interest on the allowance of a claim for refund is a separate and self-subsisting right given by a statute enacted after, and independent, of, the Revenue Act of 1917 and Section 210 thereof. It is a right which continues to exist even when the right to the refund is extinguished by payment. *Girard Trust Company* v. *United States, supra.* It is not even like the right to interest which is incidental to taxes recovered from a collector, as in the case of *Stewart* v. *Barnes*, 153 U. S. 456 (1894). *Girard Trust Company* v. *United States, supra.* And the application of the statute giving this right involves none of the complicated administrative determinations involved in the application of Section 210. It is a pure question of statutory construction and simple arithmetic, once the amount of refund has been determined. The only possibility for the exercise of any administrative discretion comes in the allowance of the refund. Once the refund is allowed, the Commissioner has determined what amount of money was wrongfully withheld from the taxpayer by the Government. Congress has determined by clear and simple legislative enactment what the Government shall pay for the wrongful retention of this money. The allowance of interest under Section 1324 (a) of the Revenue Act of 1921 is just as simple a ministerial act where the refund is based upon special assessment as where it is based upon any other grounds, and would even be subject to the writ of mandamus. *Cf. Blair* v. *United States, ex rel, Birkenstock*, 271 U. S. 348 (1926).

POINT V

The Court of Claims has erroneously treated the right to interest under Section 1324 (a) of the Revenue Act of 1921 as merely an incident to the recovery of the principal amount of a refund, in direct conflict with the decision of this Court in the Girard Trust Company case.

The Court of Claims continues to entertain the old error which caused the reversal of its decision by this Court in the *Girard Trust Company* case. In the *Girard Trust Company* case, the Court of Claims held that a suit could not be maintained for the recovery of interest on a refund under Section 1324 of the Revenue Act of 1921, where the principal amount of the refund had been paid. The Court of Claims treated the right to interest as merely an incident of the right to recover the principal, relying upon *Stewart* v. *Barnes, supra.* When the right to the principal was extinguished by payment, the Court of Claims thought that no independent action could be maintained for the recovery of interest which was only incidental to the principal. In the case at bar, the Court of Claims falls into the same error by reasoning that, since the right to recover the principal amount of the refund could not be sued upon in court, an independent action for the recovery of interest, which is incidental to the principal, cannot be maintained. In the *Girard Trust Company* case an action could not have been maintained for the recovery of the principal for the reason that the right to the refund itself had been extinguished by payment. In the case at bar, an action could not have been brought in court for the recovery of the refund itself for the reason that the right was enforceable only before an administrative tribunal. In both cases the Court of Claims reasoned that since an action could not have been maintained in court for the recovery of the principal, an independent action could not be maintained for the recovery of the interest which the Court of Claims regarded as a

mere incident to the recovery of the principal. It is submitted that the Court of Claims in the case at bar has fallen into the same old error of treating the right to interest under Section 1324 of the Revenue Act of 1921 as merely incidental to the recovery of the principal amount of the refund. The failure of the Court of Claims to recognize that this Section creates a separate and independent right which gives rise to an independent action is in direct conflict with the decision of this Court in the *Girard Trust Company* case.

POINT VI

The Court of Claims erred in holding that the protest was not a protest against an illegal assessment and therefore was not a protest within the meaning of Section 1324 (a) (1).

The Court of Claims held that the taxes refunded were not illegally assessed and that for that reason there could be no valid and effective protest. This holding is expressed in the following language taken from the opinion of the Court:

> "It (petitioner) was granted a refund not because it would have been illegally assessed had the commissioner refused to grant it, because had he refused the plaintiff would have been without remedy, as the matter was within his discretion, even if it had filed a formal protest and a formal claim for a refund. * * *
>
> * * *
>
> A request for a special assessment, therefore, under these circumstances, does not convey the idea, the thought, or conviction that it was intended as or was a protest, or a claim for a refund, since it is clear that neither one would have been of any benefit to it as far as the decision of the commissioner was concerned.
>
> * * *
>
> * * * The plaintiff by the assessment under its return had not been illegally assessed as to its invested capital, for the decision of the commissioner was final and legal" (R. 28, 29).

The same idea seems to be expressed in the brief for the United States in opposition to the writ of certiorari. The following is taken from page 5 of the brief for the United States:

> "The letters merely request a hearing on a matter entirely within the Commissioner's discretion, on the ground that unless special assessment is given, it would be *unfairly but legally* bound to pay taxes disproportionate to the taxes of other companies in the same line of business." (Italics ours.)

Both the opinion of the Court of Claims and the brief for the United States in this Court assume that a valid protest exists only where the tax protested against is illegal.

We do not concede that a claim for refund or a protest within the meaning of Section 1324 (a) of the Revenue Act of 1921 involves any idea of illegality of the tax other than that on some ground some amount is legally refundable. Even granting, however, that the illegality of the tax refunded is an essential basis of a protest or a claim for refund within the meaning of Section 1324 (a), this element is present in the case at bar.

We submit that if a taxpayer was entitled to have its tax assessed under Section 210 of the Revenue Act of 1917 the collection of a greater amount of tax, assessed under Section 201 of the Revenue Act of 1917, was illegal. The contrary position which is taken by the Court of Claims and by the Solicitor General in his brief in this Court is due to a misunderstanding of the nature of Section 210 and of the decision of this Court in the *Williamsport Wire Rope case, supra.* The *Williamsport Wire Rope case* held that an action could not be maintained in the Court of Claims for the refund of taxes based upon Section 210 of the Revenue Act of 1917 (or Sections 327 and 328 of the Revenue Act of 1918). The application of Section 210 was thus left to the administrative discretion of the Commissioner. But it was not denied that a taxpayer had a legal right to special assessment where his case fell within

the provisions of Section 210. The enforcement of this legal right was simply left to an administrative tribunal rather than to a Court.

While there may be no right in a suit based upon a claim for refund to force the Commissioner to grant special relief under Section 210, the Act is mandatory upon him to do so in the proper case. Section 210 provides:

> "That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction *shall be* the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction * * * for the same calendar year of representative corporations, * * * engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, etc." (Italics ours.)

It should be noticed that it is not provided that the Secretary or Commissioner *may* in his discretion grant special assessment. On the contrary the law declares that when a certain condition exists the amount of the invested capital deduction *shall be* computed in the manner specified. If the facts of a taxpayer's case bring it within the terms of this section, he is entitled legally, under this statutory provision, to special assessment. If the law gives him the right to special assessment, a greater amount of taxes collected from him on another basis is illegal and excessive. All that the *Williamsport Wire Rope case* holds is that the Commissioner or Secretary of the Treasury will generally have the final decision on the question whether a taxpayer is legally entitled to special assessment under this section, and, by the same step, whether the taxes collected without resort to Section 210 are excessive and illegal.

As was said by the Board of Tax Appeals in *Appeal of Davis & Andrews Co.*, 2 B.T.A., 328, after quoting Section 327 of the Revenue Act of 1918:

"In three of the four cases above, it is necessary for the Commissioner to determine certain facts which operate as conditions precedent to the application of Section 328, *but when these conditions precedent have been found by him the application of the statute is mandatory.* * * * Under these circumstances, we are of the opinion that, where the Commissioner has once found the antecedent circumstances, the provisions of Section 327 and 328 apply, and *the tax must be computed under the latter section.*" (Italics ours.)

The Government's argument really amounts to the proposition that since the Commissioner might have denied special assessment and decided that the taxes imposed under Section 201 were legally collected, no protest was possible. But this is a possibility which is present in every protest. The court, Commissioner or other tribunal which passes upon any protest or claim for refund may in any case deny the taxpayer's claim and hold that the taxes were legally collected. If the Government's reasoning is sound, there could never in any case be a valid protest against illegality because it may be ultimately determined by the Commissioner, judge or tribunal vested with final decision in the case that the taxes were not illegally collected!

CONCLUSION

The essence of the petitioner's case is this: Petitioner was compelled by law to make its return and pay its tax in the first instance under Section 201 of the Revenue Act of 1917. Article 24 of Regulations 41 of the Treasury Department provided:

"In every case of a trade or business having invested capital a return shall be made in the first instance in accordance with Article 21 or 23, but the taxpayer may submit therewith a statement of reasons why in his opinion the tax should be assessed in accordance with this article."

The obvious purpose of this regulation was to assess all

taxpayers having invested capital under Section 201, and to prescribe the sole method by which the taxpayer should protest against such assessment and give notice to the taxing officers of its claim to special assessment under Section 210, in order, to quote the language of this Court, that the taxing officers might "take remedial measures at once."

The petitioner complied scrupulously with these regulations. It made its return under Section 201, submitted therewith a statement of reasons why in its opinion it should be assessed under Section 210 rather than Section 201 and requested such assessment. It was assessed under Section 201 and paid its tax thereunder, at the same time repeating its protest against such assessment under Section 201 by again requesting assessment under Section 210.

This course of action constituted a complete and exact compliance with the definition and requirements of protest as prescribed by the Treasury Department in its own regulations and by this Court in the *Girard Trust Company* case, *supra*.

The protest was the foundation of a claim against the Government—a claim for special assessment under Section 210. The Secretary of the Treasury was designated by Congress as the tribunal before whom such claims should be decided. The Secretary of the Treasury entertained the claim, decided in favor of the plaintiff and allowed a refund.

There is not a word in Section 1324 (a) expressly stating or even indicating that the "claim for the refund" referred to must be enforceable in court. Such a conclusion cannot be implied. Congress has repeatedly and consistently in all tariff acts since 1842 required protest in connection with claims for the refund of taxes reviewable by an administrative tribunal and not enforceable in court. To now hold that Congress, in using the word "protest" in Section 1324 (a) in connection with claims for the refund of taxes, intended to exclude all claims not enforceable in court is to run directly counter to the intention and meaning of Congress continuously expressed over a period of almost ninety years.

It is, therefore, respectfully submitted that this case should be remanded to the Court of Claims with instructions to enter judgment therein for the petitioner for interest on the sum of $457,341.37 at the rate of 6 per cent per annum from the date on which the petitioner's 1917 income and excess profits taxes were paid to the date on which said taxes were in part refunded to the petitioner.

Respectfully submitted,

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Attorneys for Petitioner,
170 Broadway, New York, N. Y.

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VALENTINE B. HAVENS,
W. A. SUTHERLAND,
DONALD HAVENS,
Of Counsel.

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD) "Exhibit A"

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Form 843 (Rev. 1956)
Comptroller General U. S.
January 31, 1956

CLAIM FOR

- [X] ABATEMENT OF TAX ASSESSED
- [ ] CREDIT AGAINST OUTSTANDING ASSESSMENTS
- [ ] REFUND OF TAXES ILLEGALLY COLLECTED
- [ ] REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
Docket
Amount number
Date received
Collector of Internal Revenue

IMPORTANT
File with Collector of Internal Revenue whose assessment upon which filed is. Not acceptable unless completely filled in.

Date of _____ } 19__
County of _____ }

NOTICE TO COLLECTOR
Collector must indicate in block given the kind of claim, namely, to abate the same.

Date received by Administrative Unit.

Stamp here

TYPE OR PRINT

_____
(Name of taxpayer or purchaser of stamps.)

_____
(Residence—give street and number as well as city or town and State.)

_____
(Business address.)

This document, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From	19__
To	19__

1. Business in which engaged _____
2. Character of assessment or tax _____ (If tax or upon which the tax was assessed, or the stamps affixed.)
3. Amount of assessment or stamps purchased _____ $ _____
4. Reduction of Tax Liability requested (Income and Profits Tax) _____ $ _____
5. Amount to be abated _____ $ _____
6. Amount to be refunded (or such greater amount as is legally refundable) _____ $ _____
7. Dates of payment (see Collector's receipts or Independents of canceled checks) _____
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed _____
9. District in which unpaid assessment appears _____
10. Amount of overpayment claimed as credit _____ $ _____
11. Unpaid assessment against which credit is asked; period from _____ to _____ $ _____

Deponent verily believes that this application should be allowed for the following reasons:

_____

_____

_____

FILE COPY

MAR 12 1931
CHARLES ELMORE CROPL
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 263

MAAS & WALDSTEIN COMPANY, *Petitioner*,
vs.
THE UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

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CHAS H. POTTER & CO., INC., WASHINGTON, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1930

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MAAS & WALDSTEIN COMPANY, *Petitioner*,

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THE UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

The respondent's brief refers to a statement made by this Court in *Girard Trust Co. et al. v. United States*, 270 U. S. 163:

> "A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection so that they may take remedial measures at once."

Respondent's brief argues that assessment of the tax as originally returned would not have been illegal and therefore a protest would have been unavailing. We think that

we have answered this argument in our main brief, particularly in Point VI, but we desire to make the following additional observation:

The overassessment in this case was approved by the Commissioner of Internal Revenue on May 9, 1922 (R. 24), and was therefore made under the provisions of Section 1315 of the Revenue Act of 1921 and Section 252 of the same Act.

Section 1315 of the Revenue Act of 1921 reads in part as follows:

> "Sec. 1315. That section 3220 of the Revised Statutes, as amended, is re-enacted without change, as follows:
>
> " 'Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; etc. * * *"

Section 252 of the Revenue Act of 1921 reads in part as follows:

> "Sec. 252. (a) That if, upon examination of any return of income made pursuant to this Act, * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer; etc. * * *"

We take it that the refund in this case was properly made by the Commissioner. At least that point is not in

dispute here. Therefore, the refund must have been made because the prior collection was "in excess of that properly due" (Sec. 252) or "erroneously or illegally assessed or collected" (Sec. 1315) or "unjustly assessed or excessive in amount or in any manner wrongfully collected" (Sec. 1315).

When this Court in the *Girard Trust Company* case stated that the function of the protest was to invite the attention of the taxing authorities to the "illegality" of the collection so that they might take remedial measures at once, we submit that the Court was using the term "illegality" in a generic sense, so to speak, and intended to include all the cases referred to in Sec. 1315 and Sec. 252 of the Revenue Act of 1921, and desired to draw no distinction (if indeed a distinction exists) between taxes which are "erroneous" or "excessive" and those which are "illegal." We submit that the granting of the refund presupposes the illegality of the collection.

On page 9 of its brief, petitioner makes the following statement:

> "In *Greenport Basin & Construction Co.* v. *U. S.*, 260 U. S. 512, a claim for abatement filed before payment of the tax was recognized as a valid protest."

For the sake of clarity, a reference should perhaps here be given to the decision of the District Court in the *Greenport Basin* case (269 Fed. 58), as this Court did not specifically discuss the question of protest in its opinion. The District Court discussed at length the question of whether the filing by the taxpayer of a claim for abatement was a valid protest, and held that it was. This Court in its statement of facts, without discussion, stated simply that the tax was paid under protest.

The *Greenport Basin* case was followed by the District Court of Connecticut in the case of *Capewell Horse Nail Co.* v. *Walsh*, 4 Fed. (2d) 815. In the reargument in

this case, which will be found in 1 Fed. (2d) 818, Thomas, J. said:

> "When the *Greenport Basin* case, 260 U. S. 512, 43 S. Ct. 183, 67 L. Ed. 370, cited in the original memorandum filed by this court was before the Supreme Court of the United States, in his summary of the facts, Mr Justice Brandeis said: 'The company insisted that the correct amount was $12,417.36, and paid the tax as assessed, *under protest.*'
>
> "This is all that was said by the Supreme Court respecting the protest, but in the court below Judge Garvin said, in *Greenport Basin & Constr. Co.* v. *U. S.* (D. C.), 269 F. at page 60: 'Even if it were necessary to plead duress or protest, the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes assessed before payment. This complies with every requisite of a payment under protest. *Chesebrough* v. *U. S.*, 192 U. S. 253, 24 S. Ct. 262, 48 L. Ed. 432; *City of Philadelphia* v. *Collector*, 5 Wall. 720, 18 L. Ed. 614. The government urges that it is necessary to make a protest at the time of actual payment, but it seems to the court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim.'
>
> "From the opinion of the Supreme Court it is apparent that this claim was not stressed, but, on the contrary, abandoned, leaving Judge Garvin's ruling as the law where the taxpayer files a claim for abatement, as he held that such claim for abatement is equivalent to protest. * * *"

This case was appealed and the decision affirmed by the Circuit Court of Appeals, Second Circuit, 4 Fed. (2d) 991 (5 A. F. T. R. 5362), under date of February 2, 1925. The Circuit Court emphatically approved the rule that

once having filed a claim for abatement of the tax, it is not necessary that the taxpayer again protest at the time of payment.

The last point which respondent makes in its brief is that the protest was not sufficiently specific to comply with the requirements of the statute because the protest did not contain full or sufficient evidence in support of the claim. The respondent argues that paragraphs 3 and 4 of Article 52 of Regulations 41 require that the taxpayer shall submit evidence in support of its claim for special assessment and that taxpayer's letter of March 28, 1918, did not contain such evidence.

We believe that the respondent is confusing the requirements laid down by the Regulations as to the *proof* of claim for special assessment with the requirements of Section 1324 (a) as to protest. It is true that the Regulations naturally require a taxpayer to submit proof in support of its claim for special assessment before such claim can be allowed. In fact all claims of taxpayers before the Treasury Department must be supported by proof. The function of a protest, however, is not to *prove* a claim but to give notice of the basis of and reasons for the claim. An examination of the taxpayer's letter of March 28, 1918 (R. 8), will show that the petitioner set forth the basis of and reasons for its protest against taxation under Section 201 and Section 207 with unusual accuracy and clarity.

CONCLUSION

In conclusion, it is again submitted that this case should be remanded to the Court of Claims with instructions to enter judgment therein for the petitioner for interest on the sum of $457,341.37 at the rate of 6% per annum from the date on which the petitioner's 1917 income and excess

profits taxes were paid to the date on which the said taxes were in part refunded to the petitioner.

Respectfully submitted,

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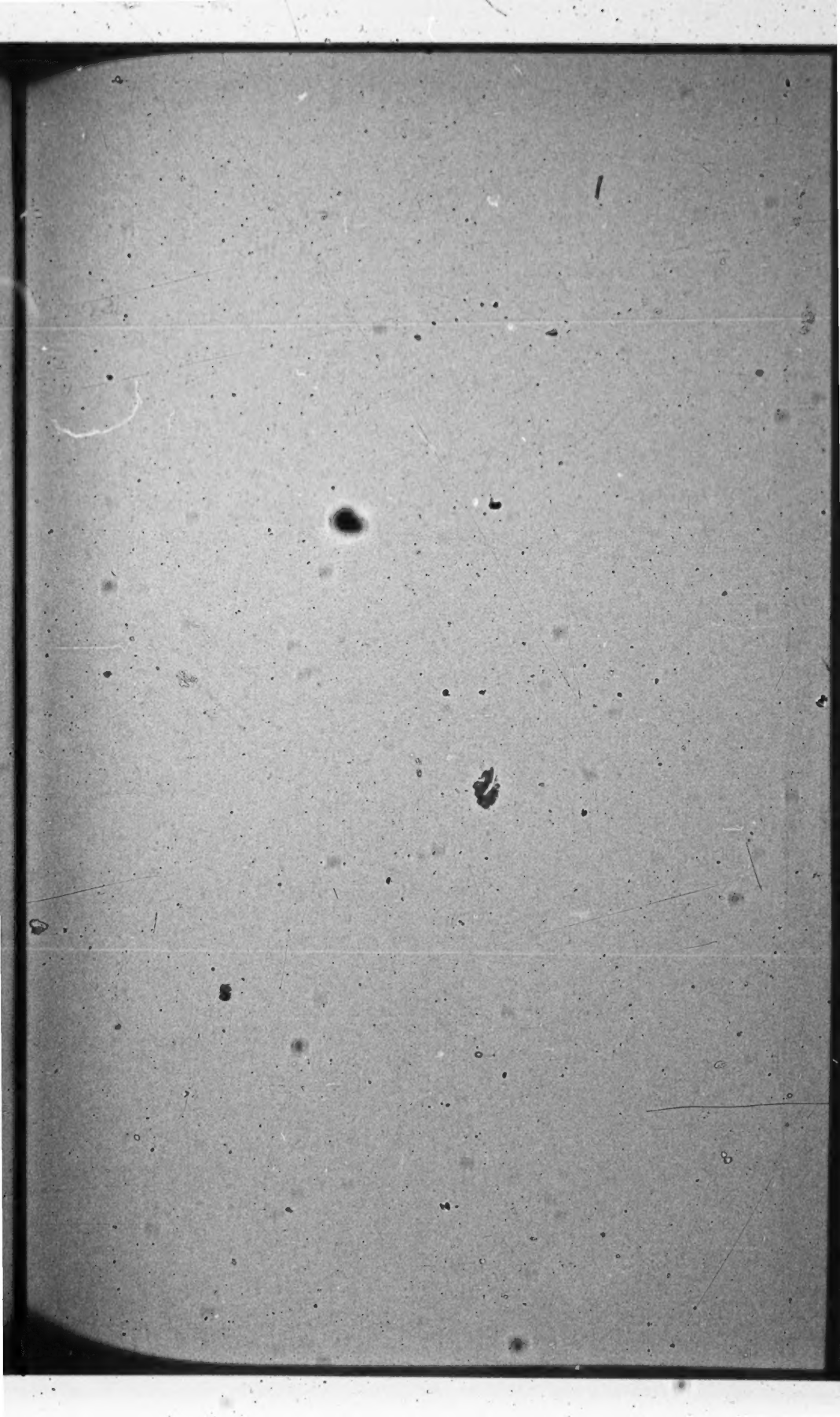

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CHARLES ELMORE

No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1930

MAAS & WALDSTEIN COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 263

MAAS & WALDSTEIN COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 25) is reported in 37 F. (2d) 196.

JURISDICTION

The judgment sought to be reviewed was entered on December 9, 1929. (R. 30.) A motion for a new trial was overruled on April 7, 1930. (R. 31.) The petition for certiorari was filed on July 7, 1930. (R. 31.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled to interest on a refund of excess profits taxes for 1917 on the ground that its request for special assessment was either "a specific protest" or a "claim for refund" within the meaning of Section 1324 (a) of the Revenue Act of 1921.

STATUTE AND REGULATIONS INVOLVED

Section 1324 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316, provides:

> SEC. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

Article 265 of Regulations 33, revised, promulgated January 2, 1918, under the Revenue Act of 1917, provides in part as follows:

> ART. 265. Claims for the refunding of assessed taxes and penalties must be made out upon Form 46. In this case, as in that of claims for abatement upon Form 47, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. The claim should be still further supported by an affidavit of the deputy collector of the proper division, and by the certificate of the collector, showing the list, page and line upon which the assessment appears, the amount of the tax, and the date of payment thereof.

STATEMENT

On March 28, 1918, the petitioner filed its income and excess-profits tax return for the year 1917. (R. 20.) Attached to the return was a request for special assessment under the applicable provisions of the Revenue Act of 1917. (R. 21.) This request was renewed by letter to the Collector on June 14, 1918. (R. 21.) On June 20, 1918, the taxes for 1917 were paid. (R. 20.) On December 30, 1921, the petitioner filed a claim for refund of a part of these taxes. (R. 21.) On April 15, 1922, the Commissioner approved a schedule of overassessments embracing an overpayment in favor of the petitioner of $462,038.34 (R. 22), thus granting the taxpayer's request for a special assessment.

This sum was paid to the petitioner without interest. (R. 24.) This suit was brought to recover interest on the amount so refunded.

ARGUMENT

The petitioner contends that under Section 1324 (a) of the Revenue Act of 1921 it is entitled to interest on its overpayment of 1917 taxes. It urges first that its 1917 income and profits taxes were paid under "a specific protest" so that it should receive interest from June 20, 1918, the date of payment, to May 9, 1922, the date of the allowance of the refund. It urges in the second place that, even if the payment was not made under specific protest, nevertheless the letter of June 14, 1918, was a "claim for refund" so that it should receive interest from six months after June 14, 1918, to May 9, 1922.

We submit that the tax was not paid under protest.

As a prerequisite to the recovery of interest upon the allowance of a claim for refund, Congress has required that the taxpayer shall have paid the tax "under a specific protest setting forth in detail the basis of and reasons for such protest." "Protest," as used in Section 1324 of the Revenue Act of 1921, means an objection to the validity and legality of an assessment or collection. In *Girard Trust Co. v. United States*, 270 U. S. 163, 172–173, the provision of Section 1324 was considered by this Court

to have been "intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes. * * * A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once." In that case the taxpayer's statement used the word "protest" but did not accord with the statutory requirement of giving specific reasons for the alleged illegality of the collection, and this Court refused to allow any recovery of interest on the amount refunded.

The three letters written by the petitioner (R. 7, 8, 10) do not object to paying the tax assessed. The third letter, dated June 14, 1918, characterizes the second letter as "A request * * * for assessment" under Article 52 of Regulations 41. The letters merely request a hearing on a matter entirely within the Commissioner's discretion, on the ground that unless special assessment is given, it would be unfairly but legally bound to pay taxes disproportionate to the taxes of other companies in the same line of business. There was no objection that the assessment or collection of the tax was illegal. There was an expressed dissatisfaction at the assessment under Section 201, but no protest against paying the tax so assessed.

We submit that no "claim for refund" was made by the petitioner before that of December 30, 1921.

A request for special assessment is not a claim for refund. *Stauffer, Eshleman & Co., Ltd.*, v. *United States*, 66 C. Cls. 277. Had the petitioner's letters been sworn to and had they contained all that must be in a claim for refund, it is possible that the requirement of Article 265 of Regulations 33 (p. 3, *supra*) that such claims "must be made out upon Form 46" could be overlooked. *Lasher* v. *United States*, 65 C. Cls. 295. But these letters were not even sworn to, although Article 265 of Regulations 33 specifically requires that "All the facts relied upon in support of the claim should be clearly set forth under oath." The importance of complying with such a requirement was pointed out by this Court in *Lucas, Commissioner*, v. *Pilliod Lumber Company*, 281 U. S. 245. Moreover, the letters were written before the payment of the tax. A claim for refund can not be filed until after the taxes have been paid. *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 205. The taxpayer made no effort to comply with the regulations in force at the time the letters were written. Its request for special assessment has none of the characteristics of the claim for refund contemplated by the statutes and regulations.

We deem it unnecessary to consider the various subsidiary points raised in the petitioner's brief which criticize the language of the opinion below. The reasoning of the Court as to these points does not seem clear and we do not support it, but the result, we submit, is correct.

CONCLUSION

The judgment of the court below is correct. There are no decisions in conflict with it. It is consistent with the most applicable decision of this Court. The petition should be dismissed.

Respectfully submitted.

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Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
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SEPTEMBER, 1930.

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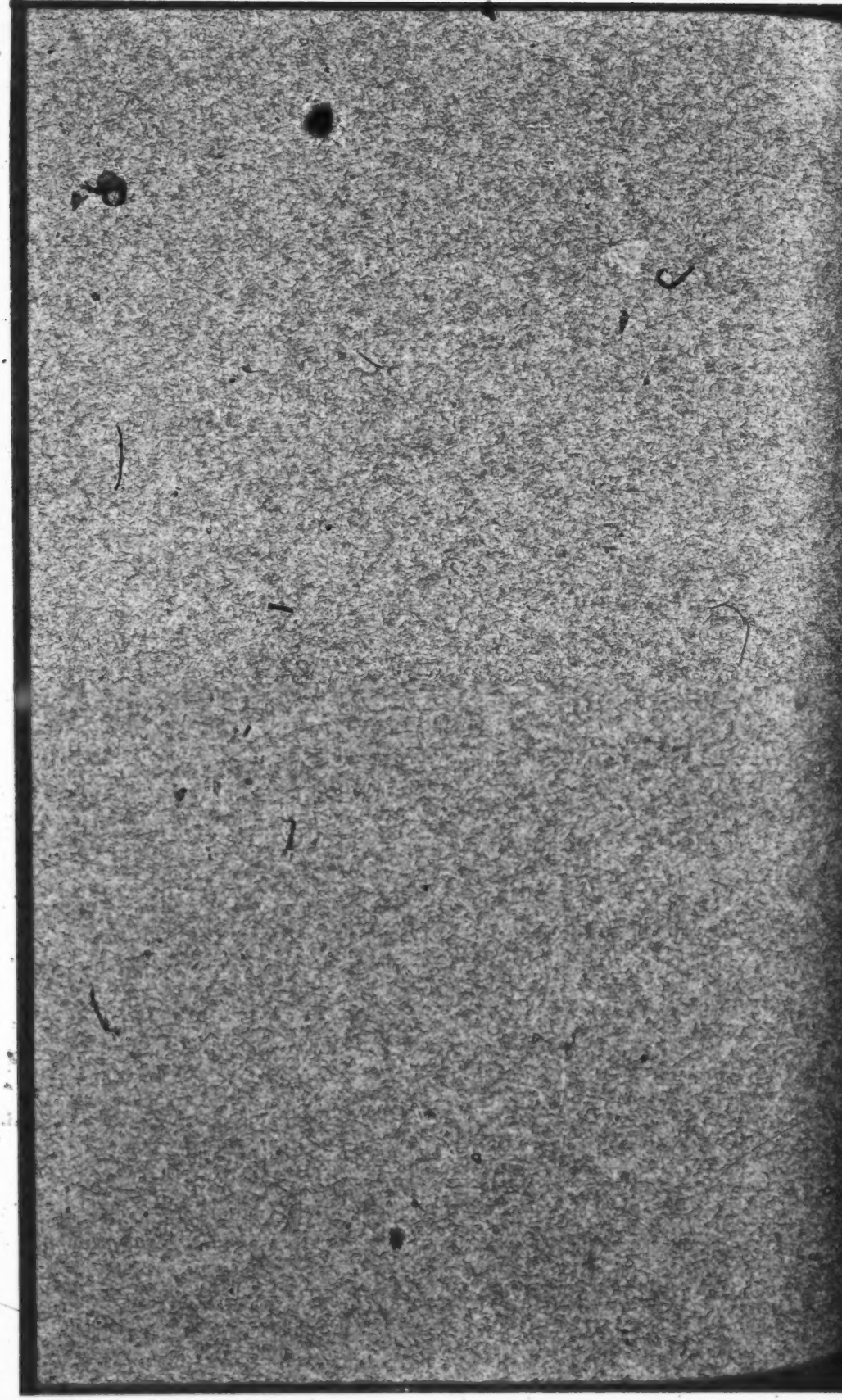

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No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1930

MAAS & WALDSTEIN COMPANY, PETITIONER

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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MAAS & WALDSTEIN COMPANY, PETITIONER

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 25–30) is reported in 68 C. Cls. 613 and in 37 F. (2d) 196.

JURISDICTION

The judgment of the Court of Claims was entered on December 9, 1929. (R. 30.) A motion for a new trial was overruled on April 7, 1930. (R. 31.) The petition for certiorari was filed on July 7, 1930 (R. 31), and the writ was granted on October

13, 1930 (R. 33). The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled to interest on a refund of excess profits taxes for the year 1917 from the date of payment of such taxes to the date of allowance of the refund, on the ground that its request for special assessment was "a specific protest" within the meaning of Section 1324(a) (1) of the Revenue Act of 1921.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

On March 28, 1918, the petitioner filed its income and excess profits tax return for the year 1917. (R. 20.) Attached to the return was a request for special assessment under the applicable provisions of the Revenue Act of 1917. (R. 8, 21.) On June 20, 1918, petitioner paid the taxes for 1917 and at the same time forwarded to the Collector a letter dated June 14, 1918, renewing the request for a special assessment. (R. 10, 21.) On December 30, 1921, the petitioner filed a claim for refund of a part of these taxes. (R. 21.) On April 15, 1922, the Commissioner approved a schedule of overassessments embracing an overpay-

ment in favor of petitioner of $462,038.34 (R. 22), thus granting the taxpayer's request for a special assessment. This sum was paid to the petitioner without interest. (R. 24.) This suit was brought to recover interest on the amount so refunded.

SUMMARY OF ARGUMENT

The petitioner can not recover interest on the amount refunded to it unless it complied with the statutory requirements prescribed by Section 1324 (a) (1). The letter of March 28, 1918, requesting a special assessment expressed no objection to payment of the tax assessed under Section 201 of the 1917 Act, but, on the contrary, tacitly admitted that the petitioner was under obligation to pay such tax. Moreover, there was no illegality against which protest could be made, since the allowance of special assessment was entirely within the discretion of the Commissioner. Payment was, therefore, not made under protest.

Even if the letter requesting special assessment be construed as a protest, it was not a specific protest within the meaning of Section 1324 (a) (1). It did not set forth sufficient facts to enable the Commissioner to determine whether the petitioner should be granted a special assessment.

ARGUMENT

In the Court of Claims the petitioner contended that, even if its request for special assessment was not a specific protest within the meaning of Section

1324 (a) (1), nevertheless such request amounted to an informal claim for refund, entitling it to interest from six months after the date of filing such claim under Section 1324 (a) (3). This contention has now been entirely abandoned by petitioner, which relies solely on the proposition that its request for special assessment was a specific protest against payment of the tax as computed in the return filed March 28, 1918. (Brief, pp. 4–5.)

I

THE PETITIONER'S REQUEST FOR A SPECIAL ASSESSMENT DID NOT CONSTITUTE A PROTEST WITHIN THE MEANING OF SECTION 1324 (a) (1)

In the Revenue Act of 1921 Congress for the first time made provision for the allowance to taxpayers of interest on taxes refunded or credited to them. As a prerequisite to the recovery of such interest from the date of payment of the tax, Section 1324 (a) (1) of the 1921 Act (*infra*, p. 11) required that the taxpayer should have made payment "under a specific protest setting forth in detail the basis of and reasons for such protest." The right to recover is conditioned upon compliance with the statutory requirements. *Girard Trust Co.* v. *United States*, 270 U. S. 163; *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160.

The petitioner contends that its letter of March 28, 1918, requesting the Commissioner of Internal Revenue to grant it a special assessment constituted a specific protest within the meaning of the

act. The Court of Claims held that this letter was not a protest (a) because it did not, in fact, state that the petitioner objected to paying the tax, and (b) because a protest must be directed to an illegal collection, whereas all that was requested was the exercise of the Commissioner's discretion in a matter wherein his decision was final and conclusive. The decision below is in accord with an early ruling of the Treasury Department holding that an "application for special assessment * * * does not in itself constitute a sufficient specific protest to meet the requirements of Section 1324 * * *." Income Tax Decision 1335, published in I–1 Cumulative Bulletin (January–June, 1922) p. 404. See also Solicitor's Memorandum 2113, published in III–2 Cumulative Bulletin (July-December, 1924) p. 352.

It is obvious that payment is not made under protest unless the protest antedates or is contemporaneous with payment. Petitioner's letter of March 28, 1918, antedated payment, and the letter of June 14, 1918, accompanied the check. But neither of these letters indicated that the petitioner was affirmatively objecting to making payment. The letter of March 28 (R. 8) clearly admitted liability for the amount of tax set forth in the return and requested that the petitioner be given special consideration in the Commissioner's discretion. We submit this does not have the force of a protest as that term is understood in relation to taxation.

In *Girard Trust Co.* v. *United States*, 270 U. S. 163, *supra*, this Court said (p. 173):

> A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once.

The court below considered that assessment and collection of the tax under Section 201 of the Revenue Act of 1917 would not have been illegal had the Commissioner refused to grant the petitioner's request for a special assessment. That section imposed an excess-profits tax upon "every corporation, partnership, or individual" and specified the manner in which such tax should be computed. Section 210 (*infra*, pp. 10–11) contained provisions for relief in certain exceptional cases, providing—

> That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital,

certain deductions should be made.

The language of the section seems to indicate that it was designed primarily to aid the collecting officials in cases in which by reason of exceptional circumstances they were unable to compute accurately the amount of the taxpayer's invested capital. No provision was made for special assessment on the initiative of the taxpayer nor for protest against, or claim for refund of, a tax assessed under Section 201. But Article 52 of Regulations 41 (*infra*, pp. 11–12), promulgated under the Revenue Act of

1917, permitted the taxpayer to "submit to the Commissioner of Internal Revenue evidence in support of a claim for assessment under the provisions of section 210."

In requesting such special assessment, the taxpayer was not objecting to an illegal collection. It paid the tax, tacitly conceding that Section 201 compelled it to do so, but asked for a reduction in the amount of such tax, not on the ground that it was legally entitled to a reduction, but on the ground that it would otherwise suffer undue hardship as compared with other organizations engaged in a similar business. We submit that this was not a protest but was merely, as the letter indicates, a request for special consideration, the granting of which was entirely within the discretion of the Commissioner.

When the petitioner filed its return and paid the tax, there was no statute giving it the right to receive interest on an overpayment. Consequently, it could not have had in mind the necessity of protesting payment as a prerequisite to recovery of interest, nor would a protest have availed to lay the foundation for a subsequent suit against the Government, since this Court has held that the Court of Claims has no jurisdiction to review the conclusions of the Commissioner with respect to special assessments. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551. The purpose of the

letter of March 28, 1918, was merely to bring to the attention of the Commissioner, as required by Article 52 of Regulations 41 (*infra*, pp. 11-12), circumstances which, the petitioner considered, entitled it to preferential treatment.

II

EVEN IF PAYMENT OF THE TAX WAS MADE UNDER PROTEST, THAT PROTEST WAS NOT SUFFICIENTLY SPECIFIC TO COMPLY WITH THE REQUIREMENTS OF THE STATUTE

In *Girard Trust Co.* v. *United States*, 270 U. S. 163, *supra*, this Court said (p. 172) that the provisions of Section 1324 were—

> intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.

The petitioner stated in its letter of March 28, 1918, that the basis of its request for a special assessment was paragraphs 3 and 4 of Article 52 of Regulations 41 (*infra*, p. 12). That article merely describes in general terms the cases in which special assessments may be allowed. It further provides that the taxpayer shall submit evidence in support of its claim. The letter gave the taxpayer's net income for 1917 and stated that its various Federal taxes amounted to about 66% of that net income and that it believed that its tax was "proportionately larger than that of other representative concerns in the same line of business." It

expressed the opinion that the disproportion arose "from causes of the nature of those specified in Article 52 of Regulations No. 41" for the reason that the value of its tangible assets had been reduced in accordance with the regulations to $100,000, a figure believed to be far lower than their actual value, and that about 90 per cent of its total net income was derived from the operation of a guncotton plant which would not be needed for the purposes of its trade or business after the termination of the war, and that the regulations did not permit the taxpayer to take proper allowances "for the amortization and exceptional depreciation of this plant." (R. 8–9.)

The certificate of overassessment (R. 13) indicated that the refund had been determined on the basis of the facts set forth in the statement filed with the return, "together with other data submitted and in connection with the recommendation of the Committee on Appeals and Review." The nature of the other data and the date of their submission do not appear in the record, but it seems probable that no determination of the petitioner's eligibility for special assessment could have been predicated upon the scant information set forth in the letter of March 28, 1918. We submit, therefore, that the payment was not made under the kind of protest which this Court has held to have been contemplated by Section 1324 (a) (1).

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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Solicitor General.
CHARLES B. RUGG,
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CLAUDE R. BRANCH,
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Attorneys.

MARCH, 1931.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

STATUTES

The Revenue Act of 1917, c. 63, 40 Stat. 300, 303, 307, provides in part as follows:

> SEC. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:
>
> * * * * *
>
> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.
>
> For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be

determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Section 1324 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316, provides:

SEC. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

REGULATION

Article 52 of Regulations 41, promulgated February 4, 1918, under the Revenue Act of 1917, provides as follows:

ART. 52. *Scope of section 210.*—Section 210 provides for exceptional cases in which the invested capital can not be satisfactorily

determined. In such cases the taxpayer may submit to the Commissioner of Internal Revenue evidence in support of a claim for assessment under the provisions of section 210. (See articles 18 and 24.) Such exceptional cases may consist, among others, of the following:

(1) Where, through defective accounting or the lack of adequate data, it is impossible accurately to compute invested capital.

(2) Where upon application by a foreign taxpayer the Secretary of the Treasury finds that the expense of securing the data necessary for the computation of the invested capital would be unreasonable in view of the amount of tax involved, or that it is impracticable to determine either the "entire invested capital" or the "entire net income."

(3) Long-established business concerns which by reason of ultraconservative accounting or the form and manner of their organization would, through the operation of section 207, be placed at a serious disadvantage in competing with representative concerns in a like or similar trade or business.

(4) Where the invested capital is seriously disproportionate to the taxable income. Such cases may arise through:

(*a*) The realization in one year of the earnings of capital unproductively invested through a period of years or of the fruits of activities antedating the taxable year; or,

(*b*) Inability to recognize or properly allow for amortization, obsolescence, or exceptional depreciation due to the present war, or to the necessity in connection with the present war of providing plant which will not be wanted for the purposes of the trade or business after the termination of the war.

U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

No. 263.—October Term, 1930.

Maas & Waldstein Company, Petitioner, vs. The United States. | On Writ of Certiorari to the Court of Claims.

[May 25, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

The petitioner seeks to recover interest on an overpayment made June 20, 1918, on account of income and excess profits taxes assessed for the year 1917, which was refunded during 1922. The Court of Claims denied relief and we are asked to reverse this action.

The Revenue Act of 1917, 40 Stat. 300, 303, 304, 307, laid an income tax; also a tax upon excess profits equal to designated percentages of the net income, after making deductions therefrom as stated in Section 203. The amount of such deductions depended upon invested capital, prewar operations, etc.

The provisions of that Act here specially applicable follow—

"Sec. 205. (a) That if the Secretary of the Treasury, upon complaint finds either (1) that during the prewar period a domestic corporation or partnership, or a citizen or resident of the United States, had no net income from the trade or business, or (2) that during the prewar period the percentage, which the net income was of the invested capital, was low as compared with the percentage, which the net income during such period of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, was of their invested capital, then the deduction shall be . . ."

"Sec. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to)

for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus . . ."

Article 52, Treasury Department Regulations 41, promulgated under the Revenue Act of 1917 states—"Section 210 provides for exceptional cases in which the invested capital can not be satisfactorily determined. In such cases the taxpayer may submit to the Commissioner of Internal Revenue evidence in support of a claim for assessment under the provisions of section 210."

Revenue Act of 1921, c. 136, 42 Stat. 227, 316—

"Sec. 1324 (a). That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid. . . ."

The petitioner, a domestic corporation, on March 28, 1918, filed its income and excess profits tax return for the year 1917. From this it appeared that, reckoned according to the rule commonly applicable, the tax amounted to $1,508,400.25. With the return petitioner sent a written communication, addressed to the Commissioner, copied in the margin.* This expressed the opinion "that our tax is proportionately larger than that of other representative concerns in the same line of business" and "that this disproportion arises from causes of the nature of those specified in Article 52, of Regulations No. 41." And finally: "Upon the above

*MAAS & WALDSTEIN CO.

March 28, 1918.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: We beg to submit herewith tax returns for the Maas & Waldstein Company covering the year 1917 as follows:

Tax return	*Amount of tax*
Corporation Income Tax Return	$72,762.90
" " " "	482.56
Munitions Manufacturers' Tax Return	242,704.39
Corporation Excess Profits Tax Return	1,435,637.35
Total Amount of Tax	$1,751,587.20

statement, which we are prepared to support and amplify if required, we request assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41."

On June 20, 1918, payment was made of the full amount of the tax reckoned upon the March 28 return. This was accompanied by a letter stating "we filed a request dated March 28th for assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations 41. Understanding that these questions will be passed upon at a later date, we shall be

---

Our net income for the taxable year was $2,656,395.01. We are therefore required to pay in the above taxes substantially 66% of our next income. Of the total amount of the Excess Profits Tax, substantially 83% is assessed at the 60% rate, in addition to which we are required to pay over $242,000 for the Munitions Manufacturers' Tax.

It is our opinion that our tax is proportionately larger than that of other representative concerns in the same line of business. It is our further opinion that this disproportion arises from causes of the nature of those specified in Article 52, of Regulations No. 41, for the following reasons:

1. Under paragraph 3, Article 52, it is our belief that through the simple form and manner of our organization we are placed at a disadvantage in comparison with representative concerns in a similar trade or business. In accordance with the regulations applying to Excess Profits Tax Returns, we have reduced the value of the tangible assets acquired at the time of our organization to $100,000. No proper evidence of the actual value of these assets when acquired by the corporation is now in existence, but it is our opinion that their actual value was far in excess of $100,000. By reason of our organization, it has been possible to make our return in strict accord with the law and the regulations. We believe that this fact places us at a disadvantage with concerns which, by reason of the manner of their organization, and by reason of reorganizations through which they may have passed, are not able to correct their capital account in the manner provided in the regulations.

2. Under paragraph 4, Article 52, our invested capital, when computed in the manner specified in the regulations, is manifestly seriously disproportionate to the taxable income. This arises in part for the reasons specified in the preceding paragraph, and in part for the reason specified under (b) in paragraph 4. About 90% of our total net income was earned through the operation of our gun cotton plant. This plant was erected solely for war purposes to meet the needs of a foreign government and will not be wanted for the purpose of our trade or business after the termination of the war. Under the regulations it has not been possible to properly allow for the amortization and exceptional depreciation of this plant.

Upon the above statement, which we are prepared to support and amplify if required, we request assessment in the manner provided for in Article 52, referring also to Articles 18 and 24, Regulations No. 41.

Very truly yours, Maas & Waldstein Co., Henry V. Walker, President.

pleased to be advised that a hearing will be granted to us." At this time no provision of law permitted recovery of interest upon refunded overpayments.

December 30, 1921, petitioner filed a formal claim for the refund of excess payment of income and excess-profits tax for 1917.

The petitioner now claims that the contents of its letter of March 28, 1918, reiterated in the later one, were sufficient to meet the requirements of Section 1324 (a), Act of 1921—that what was there written amounted to "a specific protest setting forth in detail the basis of and reasons for such protest," within the meaning of the statute. The Court of Claims held otherwise; and while its opinion cannot be wholly approved, the judgment is correct and must be affirmed.

The general purpose of the petitioner's communications to the Commissioner was to induce the latter to set on foot an investigation of the Company's affairs to the end that, after ascertaining the circumstances and in the exercise of a proper discretion, he might make an assessment duly proportioned to those imposed upon others engaged in like business. There was no challenge of the Commissioner's right then to demand payment according to the general rule—no claim that in view of the facts then before him this would amount to an unlawful imposition. Considering the circumstances disclosed, the Commissioner did nothing unjust or contrary to law when he demanded payment; and if he had concluded to take no further proceedings, the petitioner could have recovered nothing. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551.

In *Girard Trust Company* v. *United States,* 270 U. S. 163, 170, 173, this Court pointed out that the Act of 1921 is remedial and was passed with the general purpose to "require the Government to recoup the taxpayer unjustly dealt with by paying interest during the whole time the money was detained." Also, we there said—"A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once."

We are unable to conclude that the petitioner's action amounted to a precise objection to an unauthorized exaction within the fair intendment of the statute. Meticulous compliance by the taxpayer with the prescribed conditions must appear before he can recover. *Lucas* v. *Pilliod Lumber Company,* 281 U. S. 245, 249.

Affirmed.